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# Pornography and Prostitution in Canada

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Report of the  
Special Committee on  
Pornography and Prostitution

Volume 1





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# **Pornography and Prostitution in Canada**

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Report of the  
Special Committee on  
Pornography and Prostitution

Volume 1

Canada



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Canadian Government Publishing Centre  
Supply and Services Canada  
Ottawa, Canada K1A 0S9

Catalogue No. J 2-55/1-1985E

ISBN 0-660-11812-2

ISBN 0-660-11809-2 (set)

Canada: \$28.00 (set)

Other Countries: \$33.60 (set)

Price subject to change without notice



## Special Committee on Pornography and Prostitution

February, 1985

The Honourable John Crosbie, P.C., M.P.,  
Minister of Justice and  
Attorney General of Canada

Dear Mr. Crosbie,

As required by the Terms of Reference assigned in June, 1983, we have inquired into and hereby report to you upon the problems associated with pornography and prostitution in Canada.

In the course of our work, we have received the valuable assistance of a number of the departments and agencies of the government of Canada, including, most particularly, the Department of Justice. In addition, we have been assisted by suggestions received from hundreds of Canadians who made presentations at the Committee's public hearings, or otherwise gave us the benefit of their views.

The recommendations contained in this Report contemplate comprehensive legal change to deal with the effects of pornography and prostitution. Just as important are the recommendations that are addressed to the need for social change and understanding in order that the very causes of the problems can be understood and remedied.

The members of the Committee have considered it a privilege to have undertaken this work.

We respectfully submit our recommendations.

*Susan M. Clark*

Susan Clark

*Mary Eberts*

Mary Eberts

*Jean Paul Gilbert*

Jean-Paul Gilbert

*John P. S. McLaren*

John McLaren

*Andrée Ruffo*

Andrée Ruffo  
(Dissenting on the  
Subject of Adult  
Prostitution)

*Joan Wallace*

Joan Wallace

*Paul Fraser*

Paul Fraser, Q.C.  
Chairman



# Preface

In a free society, basic questions about how people are required to behave and how they are entitled to express themselves, rank among the most important to be asked. They are also among the most difficult to answer. The answers to these fundamental questions, asked by each generation of Canadians, have ultimately defined our freedom and our responsibilities.

This Committee has been in pursuit of answers to these questions in the mid-1980s, and this Report is the product of our work. It is a digest of what we were told, and what we were able to find out; and, it is a product of compromises forged by seven people with differing backgrounds and experiences.

In a sense, the very fact that we were asked to discuss these issues publicly says something about this generation. Perhaps it was the reluctance of preceding generations to talk openly, or at all, about some of the manifestations of human sexuality that caused subjects such as pornography and prostitution to be whispered about, and not discussed.

We have been privileged to have discussions with Canadians. The concerns about pornography and prostitution are serious ones involving the dignity and equality of people and an appreciation of the depth and variety of human affection. We found that there was a developed and a developing interest in the two issues, not so much because they have confounded legislators, but because the practice of prostitution and the presence of pornography are clear manifestations of our contemporary society.

In the course of this Report we attempt to fairly record all sides of the debate and, at the same time, to reflect the intensity of feeling that we encountered.

In areas as complex as these it is difficult to be certain about anything. On one issue, however, we are certain: the answers to the problems raised by pornography and prostitution in Canada are not just legal answers. They are to be found, instead, in the social order of things and in the way in which Canadians practise the equality, dignity and respect that our Constitution enshrines.

To the extent we have succeeded in the performance of our responsibilities, credit is due to a number of people whom we wish to acknowledge.

We thank those hundreds of Canadians who prepared for and attended our public hearings. Their interest not only encouraged us, but confirmed that Canadians did, indeed, want a public forum to discuss these subjects.

The Committee is grateful to the Deputy Minister of Justice, Roger Tassé for his encouragement and valuable support. We also wish to thank Daniel Sansfaçon for his capable assistance in co-ordinating the empirical research commissioned by the Department of Justice and for his co-operation in the production of this Report.

Many people have assisted in the legal research that is reflected in this Report. We are particularly indebted to Professor Robin Elliot of the University of British Columbia Law School who has been the Committee's legal researcher and who also directed the work of several student assistants: Robert Grant, David Butcher, Birgit Eder, Michelle Reynolds, Terry Abelsen, Jane Ingman-Baker, Kay Vidall and Richard Brunton, all from the University of British Columbia Law School.

David Nobbs, Osgoode Hall, assumed major responsibility for analyzing the written submissions to the Committee and International Conventions dealing with pornography and prostitution. Cameron Duff, University of Windsor Law School and Diane Ryan, Fanshawe College, provided valuable assistance with legal research projects. In addition, the Committee benefitted from the work or counsel of Professors Diane Pask and Chris Levy of the University of Calgary Law School, Mr. David Porter of Toronto, and Professor John Heinz of the Department of Philosophy, University of Calgary.

The Committee's secretary, Robin Jamieson, undertook general responsibility for administration. She managed our office, organized the public hearings and co-ordinated our publications. Her assistance was invaluable.

We have had the benefit of the administrative assistance of Carolyn Partridge and Rosemary Newman of Vancouver, and Deborah Walker of Toronto. The word processing leading to the production of this report was cheerfully and patiently provided by Cecelia Klassen, Tana Nicholson, Sandra Dyrndahl and Gloria Henry of Vancouver. We are also grateful to the members of the library staff at our respective offices and universities.

All Committee members have assumed responsibilities for the writing or production of the report. While Susan Clark, Mary Eberts, John McLaren, Joan Wallace and I have written the Report, Jean-Paul Gilbert and Andrée Ruffo have willingly taken on the task of overseeing the translation and production of the french language version.

Finally, the Committee would like to record its special appreciation to those who made it possible for us to have been a part of this Committee for the past 20 months. We could not have functioned without the support and understanding of our families and those with whom we work. We give



particular thanks to those colleagues who willingly took on extra responsibilities in our absence and by so doing, allowed us to undertake the work of the Committee.

While we gratefully acknowledge all the assistance which has been given to us, any short-comings in the Report are, of course, the sole responsibility of the Committee.

Paul Fraser  
Vancouver, British Columbia  
February, 1985.





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# Part I



## Section I

### General Introduction





## Chapter 1

# The Work of the Committee

## 1. Establishment of the Committee

### 1.1 Terms of Reference and Mandate

In the last decade, the contemporary realities of pornography and prostitution have been the subject of increasing public debate in Canada. With conflicting descriptions of the problems, have come equally conflicting views of the social and legal solutions. There have been sharp lines of division in the debate. Few other social issues have so divided our public's opinion.

If Canadians have been unable to agree on exactly what should be done and why, there seems at least to be agreement that it should be done quickly and clearly.

In June, 1983, the Government of Canada established the Special Committee on Pornography and Prostitution to report to the Minister of Justice. The Committee was asked to study the problems associated with pornography and prostitution and to carry out a program of socio-legal research in support of our work.

Our specific terms of reference were:

1. to consider the problems of access to pornography, its effects and what is considered to be pornographic in Canada;
2. to consider prostitution in Canada with particular reference to loitering and street soliciting for prostitution, the operation of bawdy houses, living off the avails of prostitution, the exploitation of prostitutes and the law relating to these matters;
3. to ascertain public views on ways and means to deal with these problems by inviting written submissions from concerned groups and citizens and by conducting meetings in major centres across the country;
4. to consider the experience and attempts to deal with these problems in other countries, including the U.S., European

Economic Community and selected Commonwealth countries such as Australia and New Zealand;

5. to consider alternatives, report findings and recommend solutions to the problems associated with pornography and prostitution in Canada.

## 1.2 Members of the Committee and Staff

- SUSAN CLARK** is a Sociologist, and Dean of Human and Professional Development and Director of the Institute for the Study of Women, Mount St. Vincent University, Halifax, Nova Scotia.
- MARY EBERTS** B.A., LL.B., LL.M., is a partner in the Toronto law firm Tory, Tory, DesLauriers & Binnington, and practises civil litigation. She is co-editor of *Equality Rights under The Canadian Charter of Rights and Freedoms* and serves on the board of the Canadian Civil Liberties Association and of the Metro (Toronto) Action Committee on Public Violence Against Women and Children.
- JEAN-PAUL GILBERT** B.A., M.A. (Criminology) is Senior Board member (Quebec Region) National Parole Board; Director of the Montreal Police Department 1964-1969; President Quebec Society of Criminology 1978-1984.
- JOHN McLAREN** is a Professor of Law at the University of Calgary. He was previously Dean of Law at the University of Windsor, as well as at the University of Calgary. His teaching and research interests lie in the field of Canadian legal history and accident compensation. He is a member of the Ontario Bar.
- ANDRÉE RUFFO** B.A., B.Ed., LL.B. M.Ed., is a barrister and solicitor in private practice in Montreal, working mainly in family law and as a consultant to numerous organizations.
- JOAN WALLACE** B.A., former chairperson, Commission of Inquiry into Part-time Work, Labour Canada. Former member, Canadian Advisory Council on the Status of Women (1973-77). Former director, Canadian Research Institute for the Advancement of Women. Founding President, Vancouver Status of Women. Served on human rights tribunals for the Canadian Human Rights Commission. Writer and consultant.



PAUL FRASER  
(Chairman)

B.A., LL.B., Q.C., is a partner in the Vancouver law firm, Fraser Gifford, and practises civil and criminal litigation. He is a past President of the Canadian Bar Association, and former part-time member of the Law Reform Commission of British Columbia. He is currently a Vice-President of the Commonwealth Lawyers Association.

The Committee appointed Professor Robin Elliot of the Faculty of Law at the University of British Columbia as its Director of Legal Research.

Ms. Robin Jamieson has been Director of Administration and Secretary to the Committee.

## 2. Research

### 2.1 Empirical Research

Empirical research was commissioned by the Department of Justice after consultation with the Committee. The following working papers have been prepared for the Department and were available to the Committee:

*Sexuality and Violence, Imagery and Reality: Censorship and the Criminal Control of Obscenity*, N. Boyd, Working Paper #16;

*A Report on Prostitution in the Atlantic Provinces*, N. Crook, Working Paper #12;

*Canadian Newspapers Coverage of Pornography and Prostitution, 1978-83*, M. El Komos, Working Paper #5

*A Report on Prostitution in Ontario*, J. Fleischman, Working Paper #10;

*A Report on Prostitution in Québec*, R. Gemme, A. Murphy, M. Bourque, M. A. Nemeh, and N. Payment, Working Paper #11;

*The Ladies (and Gentlemen) of the Night and the Spread of Sexually Transmitted Diseases*, M. Haug and M. Cini, Working Paper #7;

*Prostitution and Pornography in Selected Countries*, C.H.S. Jayewardene, T.J. Juliani and C.K. Talbot, Working Paper #4;

*A Survey of Canadian Distributors of Pornographic Material*, B. Kaite, Working Paper #17;

*Pornography and Prostitution in Denmark, France, West Germany, The Netherlands and Sweden*, John S. Kiedrowski and Jan, J.M. van Dijk, Working Paper #1;

*A Report on Prostitution in the Prairies*, M. Laut, Working Paper #9;

*Vancouver Field Study of Prostitution, Research Notes*, 2 vols., J. Lowman, Working Paper #8;

*The Impact of Pornography: an Analysis of Research and Summary of Findings*, H.B. McKay and D.J. Dolff, Working Paper #13;

*A Content Analysis of Sexually Explicit Videos in British Columbia*, T.S. Palys, Working Paper #15;

*National Population Study on Pornography and Prostitution*, Peat Marwick & Partners, Working Paper #6;

*Agreements and Conventions of the United Nations with Respect to Pornography and Prostitution*, D. Sansfaçon, Working Paper #3;

*Pornography and Prostitution in the United States*, D. Sansfaçon, Working Paper #2;

*The Development of Law and Public Debate in the United Kingdom in Respect of Pornography and Obscenity*, Ian Taylor, Working Paper #14  
Department of Justice, Ottawa, 1984.

Particular findings and descriptions from this research are referred to throughout this Report. The Department of Justice proposes to publish the Working Papers following the publication of this Report.

## 2.2 Legal Research

The Director of Legal Research undertook research in the following areas:

- (i) Comparative legislation and jurisprudence in the United States, the United Kingdom, Australia and New Zealand;
- (ii) the provisions of the *Criminal Code* and related Canadian jurisprudence;
- (iii) the provisions of the *Charter of Rights and Freedoms* as they relate to pornography and prostitution;
- (iv) Canadian municipal by-laws and related jurisprudence;
- (v) previous proposed Canadian legislation and suggestions for Law Reform;
- (vi) review of reports of various Canadian Parliamentary Committees, Law Reform Commission, American, English and Australian Commissions and Committees on obscenity, pornography, film classification and prostitution.

## 3. The Committee's Approach

Obviously, each of the members of the Committee had formed some views about both pornography and prostitution before their appointment. It could hardly be otherwise. However, each member approached the Committee's task with a determination to regard previously formed views as tentative. We were determined to rethink our individual biases on both subjects.

We hope that our approach has been successful. We mention the approach we took in order to record the importance we all attached to impartially

obtaining and treating the views of those individuals and groups who made submissions to us.

The establishment of the Committee was controversial. Some groups and individuals considered that the creation of the Committee was an indication of the government's determination to legislate in an informed way. Others considered that the government of the day had established the Committee as an excuse to avoid needed legislative action. Clearly the Committee did not share this latter view, but we came to understand it. Indeed, we soon learned to appreciate the depth of feeling, urgency and concern held by those who had been living with the realities of pornography and prostitution.

It was necessary for us to acquire more than an abstract understanding of how the law appeared to be working or not working in these areas. It was also necessary for us to appreciate that changing the law was an exercise in dealing with effect and not cause.

The Committee considered that the most important aspect of its work was to ascertain the views of the public, both formally and informally. We had been asked whether there was a consensus among Canadians about what should be done to solve the problems of pornography and prostitution. We decided that we had to know as much as we could about what Canadians thought the problems actually were, if we were going to really understand the range of available solutions.

## 4. The Public Hearings

In order to do this we decided to hold public hearings across the country. We wanted to hear from those who had not only thought about the problems, but had experienced their social reality. We wanted to attract our critics as well as those who had welcomed the establishment of the Committee.

Before the meetings began, Committee members spent the Fall of 1983 familiarizing themselves with what appeared to be the issues involved in both subjects. We had early contact from the existing groups who had forceful ideas about both subjects, but what was also needed was some general public reaction from individuals, groups and institutions who had not previously expressed themselves on these issues.

In order to describe and publicize the issues as a means of focusing discussion at our public meetings, the Committee decided to publish an *Issues Paper* for circulation to those who were or might be interested in our work. A basic circulation list was established by collecting the names of groups and individuals who had expressed interest. The *Issues Paper* was published and distributed in December, 1983. The first run of 5,000 copies went quickly and eventually a total of 16,200 copies were made and circulated. The level of interest exceeded our expectations.



The public hearings took place from January to June 1984 in 22 centres across Canada. The cities and towns visited by the Committee (in order) are:

Calgary	Victoria
Edmonton	Regina
Vancouver	Winnipeg
Toronto	Ottawa/Hull
Niagara Falls	St. John's
London	Charlottetown
Windsor	Fredericton
Montréal	Halifax
Val D'or	Thunder Bay
Sherbrooke	Yellowknife
Québec City	Whitehorse

Hearings were held in every province and territory of Canada, in large and small cities, border cities and towns in order to obtain the thinking, reaction and suggestions of Canadians living in all parts of the country and in all sizes of communities.

The hearings were advertised in advance and were usually very well attended. Most presenters supplied the Committee with written copies of their briefs, either before the hearings or during them. Recordings of the hearings were made and were available to the Committee in the course of our deliberations.

The hearings were informal and as unstructured as possible. Usually there was time for a number of questions and answers and, where it was important to do so in order to understand the submissions we received, the Committee visited sections and districts of cities and towns.

Appended to this Report is a list of the individuals and groups who made submissions to us in the course of the public hearings. Throughout the Report will be found references from the various briefs.

At the same time as the Committee held public hearings, we met privately with those persons who, for one reason or another, did not want to make a public submission. These private interviews were just as important to our work as the public proceedings. We encountered prostitutes, former prostitutes, performers, parents of young prostitutes, social workers, community workers and many others who shared the benefit of their experience and particular insights.

Altogether, our contact with the Canadian public was highly informative. The briefs and submissions we received often showed evidence of weeks of preparation and work as well as an even longer previous involvement with the issues. We benefitted greatly from the hearing process and we are grateful for the many hours of effort which people devoted to them.

While ascertaining the views of the public was the most important aspect of our research, we did not consider that our mandate was, in effect, to conduct



a referendum across the country on the issues of pornography and prostitution. We considered that we were appointed to do more than tabulate differing views.

## 5. Consultations

The next phase of our work involved superimposing on the views that we had received from the public, those of the administrators, bureaucrats, researchers and others involved day-to-day with the effects and regulation of pornography and prostitution.

We consulted with the Department of Communications, the Law Reform Commission of Canada and the Canadian Human Rights Commission, as well as Canada Customs, Canada Post Corporation, the RCMP, the Canadian Radio-Television Telecommunications Commission, various of the provincial film classification boards, the representatives of the Joint Law Enforcement Project in Ontario concerned with pornography and known as Project "P". Without exception, our consultations were straightforward, informed and informative.

In addition, the Committee met with Drs. Edward Donnerstein and Neil Malamuth, whose experimentation and writing on the subject of pornography have become well known and is referred to frequently in the course of this Report.

The Committee was also privileged to meet with Professor Bernard Williams, the chairman of the Committee on Obscenity and Film Censorship appointed by the Government of the United Kingdom in 1977. Professor Williams' comments and suggestions have been invaluable.

One other aspect of the Committee's work that should be mentioned is the effort to view the material that is said to be pornographic and is currently in circulation in Canada. A number of individuals and groups who appeared at the public hearings brought with them material that was commercially available. We examined this material when it was presented and we also looked at a large variety of material that was referred to in several of the recent cases. We observed the practice of viewing the material in full and not out of context.

In coming to prepare our Report and make recommendations, the Committee imposed upon itself the discipline of preparing draft legislation whenever we recommend legislative change. We concluded at an early stage that any legal changes we might recommend should have the effect of bringing clarity and certainty to the law. It seemed to us that our contribution to law reform would be most useful if we were prepared to show precisely how the law should be changed.

If there has been a benefit to preparing draft legislation, there has also been a risk. No doubt some of it is less than perfect. However, we hope that it

will form at least the basis for further discussion and ultimately, for an overdue reform of the law.

What follows in our Report is a document that is in five parts. We first deal with the philosophical considerations that we have applied in approaching both subjects, and discuss the Canadian constitutional landscape. The issues of pornography and prostitution as they affect adults are discussed separately, and are followed by a separate part devoted to both subjects as they particularly affect young persons and children. The report ends with our recommendations.

## Section II

### Philosophical and Constitutional Considerations





## Chapter 2

# Philosophical Considerations

### 1. Introduction

Any attempt by a society to deal with pornography and prostitution must take account of its own philosophical and ethical traditions. A necessary prelude, then, to examining social and legal strategies for dealing with these problems is to analyze the thinking about pornography and prostitution in Canada and other societies which have a similar pattern of social and cultural development. Our discussion will entail a review of three different philosophical traditions, the liberal, the conservative and the feminist.

### 2. The Liberal View

There is deeply ingrained in the political and philosophical tradition in western societies, the belief that the fundamental value is the freedom of individuals to develop their own view of life, without direction from the state or from the majority. In countries with an Anglo-American legal heritage this view of the world, which penetrates deeply into all aspects of our culture, has its most influential embodiment in the writings of John Stuart Mill.<sup>1</sup> Those who espouse what might be described as the liberal view of the relationship between law and morality, emphasize Mill's dual contention that society benefits from an "open marketplace of ideas" rather than the prescription of majoritarian "wisdom", and that each individual is the best judge of his or her own interests.<sup>2</sup> The necessary corollary of this view of society is that the state is justified in intervening only to punish or control human conduct when it does harm to other people.

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.<sup>3</sup>

Apart from children and adults incapable of conducting their own affairs, what people do to themselves or in concert with others, which has no injurious impact on third parties, is the individual's own business, even if it involves the self infliction of either physical or moral harm.<sup>4</sup>

Although Mill himself did not articulate with great certainty or precision the limits of the “harm principle”,<sup>5</sup> generations of followers have attempted to give substance to it, not without disagreement. At one end of the spectrum are philosophers who attach such central importance to the notion of individual autonomy that only the narrowest interpretation of the principle is acceptable.<sup>6</sup> At the other are those who postulate a more flexible notion, including those who believe that there is a legitimate principle of “paternalism” which qualifies the harm principle. Under the latter, state intervention may be warranted in a limited range of circumstances to protect individuals from themselves.<sup>7</sup>

Mainstream liberal thought seems to be agreed that harm does embrace both physical harm to others, and the sort of psychic harm involved in people being involuntarily subjected to offensive or objectionable conduct or representations of it.<sup>8</sup> It clearly does not extend to mere feelings of moral distaste that such conduct or depictions of it exist and are being enjoyed by others. Also central to the liberal view of harm is the idea that it is the immediate cause of it which is culpable, not the more remote causes. Thus, for example, it is legitimate to proscribe driving while under the influence of drink because it has been proven to cause accidents. It is not, however, legitimate to proscribe drinking for that reason.

The practical ramifications of these views for lawmaking in the areas of both pornography and prostitution are clear. In the case of prostitution, it would follow that the law has no legitimate function in prohibiting anyone from choosing or practising that lifestyle, or in penalizing adults who, by consent, engage in sexual activity for money, as long as no physical harm is caused or threatened to either participant, and neither physical harm nor psychic offence done to others. The law may legitimately interfere with those who forcibly coerce others, even adults, to become and remain prostitutes, and who exploit them against their wishes.<sup>9</sup> It may also be invoked to penalize or control the nuisance caused to other people by prostitution.<sup>10</sup>

With pornography, it would be argued that the law has no acceptable role in preventing the production, distribution, sale or possession of pornographic material, unless some recognized harm can be attributed to it. It is legitimate for the law to intrude to prevent physical harm being done or even threatened to those who participate in pornographic productions.<sup>11</sup> Moreover, the law may be used to ensure that pornographic materials are not marketed in such a way that they cause involuntary offence to members of the public.<sup>12</sup> The law has no role in curbing the sort of alleged “harms to society” foreseen by those of a conservative philosophical view, for example, the moral disintegration of society, unless it can be demonstrated clearly that there is a direct link between the consumption of pornography and physical harm or threat of it to individuals. Such a causal relationship must rest upon empirical study and statistical probability, not upon supposition or anecdote, even though these may claim to reflect common sense.<sup>13</sup>



### 3. The Conservative View

Although the liberal view on the legal proscription and control of these phenomena is dominant in philosophical writing and jurisprudence in western countries, it is by no means the exclusive view. Modern liberal theory on the relationship of law and morality grew out of a need to answer the more traditional conservative position that there is a necessary coincidence between law and the moral values of the community.

This conservative view has two variants. The first states that societies are not simply collections of individuals, but organic units with shared ideas and institutions. The shared moral values of societies are rooted in their cultures, have stood the test of time, and embody the sober wisdom of the majority.<sup>14</sup> Their embodiment in the law is preferable to the easy or uncertain morality of pluralism, which ignores the reality that individual actions, even if directed towards the actor alone, have an impact on the “moral environment” of the community.<sup>15</sup> The second, generally associated with the views of the distinguished British jurist Lord Devlin,<sup>16</sup> adopts the more pessimistic view that, unless the law embodies and enforces traditional moral values, society will lose its “moral cement” and gradually disintegrate. The cohesive power of shared morality is essential to society’s welfare, and requires the support of the law.<sup>17</sup>

Both these strains of thinking allow in theory for significant intervention by the law to proscribe immoral conduct, even where it is freely chosen by the individual or individuals concerned, conducted in private and of no direct harm to anyone else.<sup>18</sup> They posit that the state has a right to step in and prevent personal immorality where it clearly offends the sense of propriety and decency of the majority of the community. Moreover, the criminal law, apart from its other functions, has an important symbolic role to play in stating what the common morality will not tolerate. In fact, however, some of the advocates of the “moral environment” and “moral cohesion” approaches admit that these values have to be balanced against others such as liberty and privacy. Furthermore, they accept some pragmatic reservations to these principles, such as those which stem from difficulty of enforcement.<sup>19</sup>

The translation of conservative theory into practice on pornography and prostitution reflects to some extent the tensions mentioned in the last paragraph. The act of prostitution, although detrimental to the dominant and shared morality, is normally considered by conservatives to be less serious than other forms of sexually deviant conduct. This, together with obvious difficulties in enforcement, has persuaded them that adult female prostitution will remain beyond the reach of the law. There is less certainty with respect to homosexual prostitution, because some conservatives see it as possessing the additional characteristic of “unnaturalness” which makes it particularly repellent to the community’s sense of morality. The deviance here is extreme enough that it may well outweigh other considerations.<sup>20</sup>

There is also strong condemnation of those who exploit prostitutes for personal profit or commercial gain. Here, conservatives often introduce the

idea of someone being a social parasite. Those who do not earn their own living and, in addition, live on earnings gained through immoral activities, are particularly reprehensible. Finally, the conservative view results in strong legal proscriptions against the public conduct of the trade, for example, street soliciting. Such action is justified on the ground that prostitution offends the common moral values and, therefore, ordinary citizens should not have to contend with this affront to their sensibilities as they move about their communities.<sup>21</sup>

The conservative approach to the law and prostitution is not an unambiguous one, but represents to varying degrees an accommodation between principles and what is practical in the twentieth century. The approach to pornography, however, is much more uniform and consistent.

Whatever its character, the fact that pornography is produced to stimulate sexual feelings or fantasy is subversive of the moral values of the community. Thus the intent of the material, rather than any empirical association with harm to an individual, is the measure of its illegality.<sup>22</sup> As some conservatives have a limited view of what is acceptable sexual conduct, the ambit of legislation to control pornography is predictably wide, with the consequence that representations which others would see as permissible eroticism, may be considered as indecent or immoral in the conservative's mind.<sup>23</sup> In particular, the conservative is concerned to preserve the sanctity of the family and the view that sexual relations should take place only within the context of marriage. Any activity which might be seen to encourage sexual activity outside of this context is thus to be strongly discouraged.

#### 4. The Feminist View

Traditionally, conflict on moral issues in western societies has centered on the opposition of liberal and conservative thought. In recent years, feminist thinkers and writers have begun to challenge the assumptions of both, and to give their own interpretations to the relationship between law and morality. It must be said at the outset that feminism is not itself a discrete philosophy. It is, rather, a broad coalition of interests dedicated to the common purpose of improving the status of women in society. As with other coalitions designed to achieve a practical outcome, it embraces a wide range of philosophical convictions.

The common objective of achieving true social equality itself influences and modifies the underlying philosophical positions of these feminist writers. They attempt to reconcile the traditional philosophical positions of western societies, which they have learned and often accepted, with their goal of achieving equality for women and thereby changing in a fundamental way the attitudes and structure of society. As a result, we are beginning to see feminist critiques of contemporary society which draw upon various philosophical traditions, and at the same time attempt to inform and infuse those traditions with a sense of the struggle of women for real, rather than merely formal,



equality. The resulting literature represents an important and challenging contribution to our understanding of the two social phenomena under examination, and forces us to ask whether orthodox philosophical positions really have that property of innate wisdom which is claimed for them.

In the view of feminist thinkers, our society is built around a sexual class system, which frustrates the legitimate aspirations of half the population for economic, social and sexual freedom.<sup>24</sup> Pornography is seen as especially odious because it reinforces that system by instilling and perpetuating notions about women's inferiority and limited role within society. It sets women apart as different and characterizes them as the legitimate objects of not only male sexual pleasure, but male frustration and violence.

With prostitution, the sexual class system operates in a more limited but nevertheless vicious manner, in that it sets aside a small and disadvantaged group of women to satisfy the sexual needs of men who cannot find the satisfaction they want elsewhere.<sup>25</sup> Both pornography and prostitution are predicated on the assumption of men's power over women. Men are seeking depersonalized sexual relations which call for no commitment on their part, whether this is achieved through buying the services of a prostitute or pornographic representations.

Differences exist between feminist writers as to the strategies to be adopted to combat these manifestations of sexism. Those who have a Marxist orientation incline to the view that the answer to sexism lies in the removal of the capitalist values and structures which make it possible.<sup>26</sup>

A second and larger group sees women's problems as those of gender discrimination rather than of classical economic exploitation and takes a somewhat different view. They assume the continuation of liberal democracy, and relate their critique of sexism to that politico-legal context. Some writers in this group see little value in the use of legal expedients to reform society, believing that education and other socialization processes are likely to be much more successful in the long run.<sup>27</sup>

The majority, however, favour the vigorous use of legal, as well as political and social strategies, to combat and eliminate sexism. Reorientation in the legal system requires, first of all, a change of focus in the substantive law. In prostitution this means decriminalization of the activities of prostitutes.<sup>28</sup> In the case of pornography, what is required is a new emphasis on proscribing the violence and degradation of women and children which it contains.<sup>29</sup> At the level of structures and process, steps have to be taken to make it easier for women to use the legal system to challenge the product of the pornographer, and to seek protection for themselves and their children.<sup>30</sup> Although many of these women are strong civil libertarians by conviction, they see orthodox liberal thinkers as blinkered and conscious only of the rights of their exploiters and detractors. If the rights issue is to be debated seriously, they say, then their rights to equality, freedom from personal abuse or threat, and to dignity are entitled to consideration and protection.<sup>31</sup>

It is the feminist position on the rights question which provides a significant challenge to orthodox liberal theorists. According to feminists, the liberal tends to characterize the rights issue in terms of the infringement by the state on the rights of an individual. Little or no attention is paid to the fact that rights issues often develop out of what is, at base, a conflict in the exercise of rights by two individuals. True, the immediate agent of one side may be the state, but that does not alter the fact that a clash of rights between individuals is involved.<sup>32</sup>

If this is correct, then the legal system is not only called upon to protect rights, but also to choose which right is entitled to greater protection. This is unlikely to give the liberal any trouble when it is clear that the exercise of a right by one has caused harm to the other in the exercise of those rights. Much less clear is the liberal reaction when the opposing right has not, in fact, been abridged in the concrete sense but only in the abstract, for example, when a woman claims a pornographic publication infringes her right to equality in that it treats women as degraded or subhuman. Here, the liberal would argue that in the absence of a tangible interference with the "victim's" right, there is no warrant for curtailing the offending activity.

The feminist response to this line of argument is that it demonstrates the bankruptcy of the narrow characterization of the harm principle, and points to the need to redefine the notion of rights in liberal theory.<sup>33</sup> As long as rights in the liberal glossary mean liberty in the sense of being free to act without restraint, they have little value in a society in which fundamental inequalities exist. Thus for women, the fact that on the formal level they enjoy the liberty to do certain things is of little consequence if the social environment prevents the exercise of those rights, and there is no correlative duty on the part of others to see that the rights are exercisable.<sup>34</sup> The distinction is one between "privilege" or "liberty" rights, which merely raise an obligation on others not to infringe, on one hand, and on the other, "claim" rights which generate positive responsibility to see that the claimant is enabled to exercise her rights.<sup>35</sup>

Using this extended notion of rights and tying it to the unequal position of women in society, the feminist argues that greater freedom and equality for women entails some loss of liberty and status for men:

Equality cannot flourish without limiting the privileges some already have in both the private and public spheres, because the inequalities of the present system were a product of the unequal attribution of rights in the first instance; thus greater equality and liberty for those least advantaged under the present system necessitates placing restrictions on the privilege rights of those who are presently most advantaged. And since this must be done by creating obligations either to do or forbear actions previously permitted, it can be accomplished only at the expense of negative liberty.<sup>36</sup>

The point is also made that this view is not revolutionary. The empowerment of disadvantaged groups in society has typically been achieved by this sort of social engineering.<sup>37</sup>



Feminist writers also join issue with the liberals on the interpretation of the “harm” requirement. As the discussion of the liberal view has demonstrated, the philosophical liberal has a limited perception of harm as a basis for invoking legal proscription or restraint. Either measurable harm, for example, economic, physical or mental to an individual, or statistically verifiable general harm must be established.

Feminists react in two ways to this approach. The first is to challenge the assertion that the “harm” principle is necessarily so limited. Given their perception that sexism in our society is endemic, and their belief that eradication of it requires recognition of the special claims of women, they construct a broader notion of harm which includes a social harm, and in particular, the adverse and potentially divisive effects of a significant segment of the male community developing or reinforcing a thoroughly misogynistic attitude.

Secondly, they will argue that, even if a narrower view of harm is adopted, there is enough data to demonstrate that women are victimized by the sexism inherent in pornography and prostitution.<sup>38</sup> They point to an increasing body of research by social psychologists which, it is claimed, suggests a link between pornography and violence against both women and children. The existence of this link is, they argue, supported by a growing number of reported cases in which battered women report that pornography influenced the conduct of their partners. Finally, they claim, common sense would suggest that frequent exposure to this type of material is likely to have an adverse and brutalizing effect on male perceptions of women as well as male sexuality.

In the same way that feminist writers have difficulty with liberal theory, so they reject acceptance of conservative ideas. On the surface, feminist and conservative theory seem to coincide in that they see “harm” as embracing harm to the community or to society in general. Moreover, insofar as feminist theory views the sexual exploitation of women as subversive of society, it has some similarities to the disintegration theory of Devlin. However, feminist writers are quick to point out that similarities are superficial. They see conservative theory as oppressive and unsatisfactory, because its fundamental assumption is that the ideal society is one in which women have a subordinate and submissive role, and in which sexual expression of all but the most orthodox type is frowned upon.<sup>39</sup>

Feminists view themselves not as opponents of sexual freedom (they see it as essential to female liberation), but of a form of male sexual licence which prevents the full expression of female sexuality, and threatens the physical and psychic welfare of women. Their fear of embracing conservative theory is that it would mean inviting a repressive, institutionalized sexual regime. Furthermore, they note with concern that some conservatives fail to distinguish erotica from pornography, because of their inability to break out of the paternalistic and stifling sexuality of the past.<sup>40</sup>

It will be apparent from our discussion of philosophical considerations that we have given only a broad overview of what are, in fact, very complex debates.

We have not included the many different versions of liberal, conservative and feminist thought, nor have we made specific reference to what could be termed a socialist viewpoint. Rather, our discussion is intended to present the essential arguments in each of the three approaches, since these are the foundations on which the presentations we heard at the public hearings were based. In addition, these philosophical traditions are at the root of the principles which we believe must inform any attempt to reform our legal and social responses to pornography and prostitution.

## 5. The Role of the Criminal Law

Each of the philosophical positions discussed above is reflected in attitudes towards the criminal law and its role in society. A wide range of views were put to us during the hearings as to the appropriate role of criminal law in dealing with both pornography and prostitution. These ranged from the extreme conservative position that there should be a complete identification of the criminal law of the state with the “moral law”, to the extreme libertarian view that the criminal law should intrude only when physical harm had been caused by one person to another.

It is our view that the role of the criminal law lies mid-way between these extremes. The view that criminal law is somehow the solvent of all social ills is, we believe, naive. History has shown that the enactment of draconian laws has typically had a marginal impact on behaviour patterns. With the possible exception of communities in which there has been a complete identification of church and state, a highly retributive body of law and rigid enforcement, the effectiveness of harsh criminal law has been more apparent than real. The reality has, in fact, been uneven and capricious enforcement, and mitigation of its harshness by those charged with applying the law, whether judges or juries.

We appreciate fully that law, especially criminal law, has an important and often invisible impact in moulding and influencing peoples’ behaviour, and it is clear that some criminal law provisions affect behaviour beneficially without the instrumentation of enforcement. It is important however, that we recognize that “law-abidingness” may be attributed to a range of factors other than the fact and severity of the criminal law. Moreover, there are situations, some of them in the interface between the criminal law and morality, where the criminal law is so patently ineffective that no redeeming purpose can be ascribed to it.

We also disagree with the view that the criminal law should be confined to the tangible harm caused by one individual to another. Although we think that there should be less rather than more intrusion of the criminal law into the lives of citizens, we also think that it has a wider, legitimate ambit than is often claimed for it. Criminal law is, in part, a reflection of the values of society. We penalize culpable homicide not only because it involves a “harm” by one to another, but also because we consider it undesirable for the welfare of society



that people should kill each other. This latter view reflects both the pragmatic concern that violence is disruptive of the life of a community, and the moral sense that it is bad.

In short, criminal law has something to say about both the values of society and the need to protect them by a system of proscriptions and punishments. In this, we agree with the position taken by the Law Reform Commission of Canada in its working paper on “The Limits of Criminal Laws”, and the publication of the federal Department of Justice, *The Criminal Law in Canadian Society*. In the former the Commission observed:

... The criminal law serves partly to protect against harm but more importantly to support and bolster social values. Protection against harm it seeks to achieve through deterrence, rehabilitation and - most successfully - prevention. Support of social values it manages through “morality play” technique - by reassuring, by educating and above all by furnishing a necessary response when values are threatened or infringed. And this on the face of it suggests using criminal law only against conduct causing harm or threatening values.<sup>41</sup>

In the Department of Justice study the statement was made:

The purpose of the criminal law is to contribute to the maintenance of a just, peaceful and safe society through the establishment of a system of prohibitions, sanctions and procedures to deal fairly and appropriately with culpable conduct that causes or threatens serious harm to individuals or society.<sup>42</sup>

To what degree social values and their protection or furtherance should be the concern of the criminal law is a question on which there will be widely differing viewpoints. That in part is why the question of the role of the criminal law in relation to both pornography and prostitution is so highly charged. There are dangers in criminal law being used in inappropriate ways to solve problems which may be more susceptible to other legal strategies or to non-legal social regimes. Thus we are strongly of the view that great care has to be taken to establish what are the social values that need to be reinforced and protected, and to demonstrate the propriety and efficacy of using the criminal law for these purposes.

## 6. Essential Principles

We have received briefs representing each of the several points of view elaborated upon in the foregoing sections. Each has, of course, urged that the Committee espouse the proponent’s particular view, be it the liberal, the feminist, or the conservative. We do not, in this Report, adopt in its entirety any one perspective or theory of society or of pornography and prostitution.

It is undeniable, however, that certain basic principles have informed our thinking on these issues. They have influenced the way we have formulated our recommendations, and may well have had a bearing on how we as a Committee have synthesized the public’s views and found or interpreted areas of consensus.

We want to make our premises explicit, so that readers of this Report may more fully appreciate its perspective, and the pattern for public policy which we have tried to develop. We feel confident, as a result of the deliberative phase of our Committee's work, that the principles set out below reflect some reasonable degree of social consensus, and that these principles should inform the approach of the legislator to pornography and prostitution.

Here, then, are the essential principles upon which we have sought to craft our proposals.

## 6.1 Equality

We are fully persuaded that any legal regime of dealing with pornography and prostitution must be founded upon the rights of women and men to legal, social and economic equality. We agree with the argument that the phenomena of pornography and prostitution are at least reflections (if not causes) of perceptions that women are inferior, and that men can expect women to be available to service their sexual needs. We know that many individual men do not share these perceptions. It is, however, clear that the maintenance of these attitudes towards women over the centuries has played a significant role in the historical allocation to women of subordinate roles in the social, political and economic order.

Much progress has been made toward achieving legal equality for women in Canadian society, and work continues on the discrepancies in the economic and political opportunities available to women. Yet we find convincing the arguments of those, feminists and non-feminists, who argue that the role assigned to women in pornography and in prostitution reflects the sort of social attitude that is inhibiting improvement of the status of women.

We believe that Canada should be ready, collectively, to reject the view of women which is embodied in much contemporary pornography, and in the conception of what can be expected from a prostitute. The proposals which this Committee makes for legislation, education and social programs are designed to carry forward the egalitarian impulse which we have perceived during the public hearings, and to confirm that it is not merely an impulse but also a commitment.

We recognize that the issue of equality also arises in the context of young persons. They are, in many important respects, fully the equals of adults: they deserve the same respect as human beings, regard for individual differences, and concern for human dignity that we, as adults, expect for ourselves. In our view, social policy should proceed on the basis of a firm recognition of the child's right to equality in these important areas.

However, we do not think that the child can be treated as the full legal equal of the adult, for purposes of fashioning the criminal law. Liberal thought has long recognized the particular vulnerability of the young: they are,



depending on their age and development, less able to care for themselves and protect their own interests. Society must accept a greater measure of responsibility for their welfare, and young persons may, in turn, expect some corresponding curtailment of their capacity to act as free agents. This observation leads to the second principle which we believe important to take into account in formulating policy.

## 6.2 Responsibility

We are of the view that as a general rule, the adult must accept responsibility for his or her actions. We heard during the public hearings that adult women, in particular, who become involved in pornography or prostitution should be seen as victims, whether of the economy or patriarchal social structure, or of abuse directed at them during their early years. We have sympathy with this point of view, and do not think that it would be out of place as a consideration in sentencing the individual case. However, we do not accept it as a principle upon which to structure the criminal law.

In contrast, it is our view that children should be regarded as vulnerable, and in need of society's protection, when dealing with the issues of pornography and prostitution. Children would thus be seen as victims or potential victims of people engaged, or wanting to engage, in these activities.

There is one exception to this basic approach. We have reviewed the issue of what age should be considered the upper age limit for childhood, and recommend that for legislation relating to pornography and prostitution, we adopt uniformly the age of 18 found in the *Young Offenders Act*. From this follows the real possibility that young persons of 16 and 17 (or perhaps younger) may be involved in taking advantage of still younger children, by introducing them to prostitution, to performing in pornographic displays for filming, and so on. Such exploitation might be of the older child's own motion, or it might be engineered by adults who perceive the advantage in having as fronts those who are free from serious criminal responsibility. Accordingly, we think that it would be wise to except from the general principle of the child as victim, those activities where people under 18 exploit others under 18. In such cases, the exploiter should be made to accept responsibility for his or her actions.

## 6.3 Individual Liberty

The basic idea that adults are responsible for their conduct carries with it the corollary that the law should permit them a zone free from regulation, in which they are responsible only to themselves. An important aspect of this personal liberty is, in our view, freedom of expression. The rights to speak, to think, and to create are essential to the preservation of our society, and deserving of a high degree of protection from state interference.

However, where the behaviour of an adult begins to impinge on the lives or conduct of others in unacceptable ways, there is a place for the state. We see the zone of no regulation as that where the adult's conduct does not coerce others, and where it does not impinge unacceptably on the values which are basic to our society. Equality has already been signalled as a basic principle, and we note that in the area of pornography at least, the right of some to equality will sometimes run directly counter to the right of others to create and to enjoy the creations of others. Balancing these two important values has been for us, and will be for society, a difficult yet essential task.

Other values which could readily be seen as conflicting with the principle of individual liberty are human dignity and voluntary sexual expression. So concerned are we that human dignity and voluntary sexual expression be protected in the legal regime that we include these two values with those we consider basic to our recommendations.

## 6.4 Human Dignity

It was striking to observe how often during the course of the public hearings people would affirm their view that human beings are special, caring and possessed of a basic worth and dignity which they believed was being seriously interfered with by pornography, and the treatment of prostitutes in our society. The public hearings brought to the fore many calls for a regime of regulation which fosters, not destroys, human dignity. In our view, an important part of human dignity is basic physical integrity (which can also, of course, be viewed as an aspect of individual liberty). Activities which threaten the physical well-being of others can find no real place in a civilized society.

## 6.5 Appreciation of Sexuality

We think that it is essential to accept as a point of departure for policy-making, the idea that human beings enjoy and benefit from open and caring sexual relationships, characterized by mutuality and respect. This principle extends to those under 18 as well, for the child is, in our view, a sexual being. There was little support in the public hearings for repression of sexuality as a means of eliminating what people found offensive about pornography and prostitution. Rather, the submissions which addressed this issue stressed quite the opposite theme. It was pointed out, for example, that young people often turn to pornography, soft or hard core, in the search for information about their developing sexuality, because good sex education courses and healthy erotic literature, are unavailable to them. We often heard that one of the harms of pornography was the insult offered in such material to the joy and satisfaction of non-exploitative sexual relationships. We were cautioned against developing a regime so strict that it would hamper the human need for sexual expression, whether in art, or particularly in the case of young people, in relations between consenting peers.

We believe that all of these concerns have real merit.



## 7. Conclusion

In the ensuing chapters, we propose in detail changes to the *Criminal Code*, other statutes and social programs in order to deal with pornography and prostitution. The rationale for these recommendations and their relationship to the principles outlined above will be elaborated upon. Here, however, let us simply sketch a few of the major implications of these principles.

With respect to pornography, the emphasis on equality will, we believe, require a shift from the traditional focus on sexual immorality as a basis of criminal prohibitions against pornography. We believe that the development of theory which views pornography as an assault on human rights, will have to be integrated into the conceptual framework of the criminal law on pornography. Our recommendations thus include a complete reworking of the *Criminal Code* prohibitions in this area, to create offences based not on concepts of sexual immorality but rather on the offences to equality, dignity and physical integrity which we believe are involved in pornography. The concern for the vulnerability of young persons has prompted us to devise a number of prohibitions against the use of young persons in sexually explicit material, against the sale, distribution or possession of such material, and the accessibility of such material to young people.

In each case, we have striven for specificity and clarity in the legislative description of prohibited conduct. Similarly, we have attempted to be reasonably sparing in our use of the criminal sanction. Both of these strategies stem from the desire to leave to responsible adults as much freedom of choice and as much capacity to govern their own conduct as is consistent with protection of basic values. They arise also from our hope that the criminal law will, if properly fashioned, interfere with freedom of expression only to the degree necessary to safeguard the other basic values.

With respect to prostitution, our recommendations feature withdrawal of sanctions against simple soliciting: only when the conduct causes actual adverse effect on neighbours and environment is it criminalized. The adult prostitute is accorded by our proposed regime, some leeway to conduct his or her business in privacy and dignity. We would permit one or two prostitutes to receive customers in their own home, hoping thereby to provide people with a safe alternative to the street and parked cars. In addition, we are recommending that the possibility of allowing small prostitution establishments in non-residential areas be discussed by the federal government and the provinces and territories.

Allowing prostitutes to work from their homes would also provide a less exploitative alternative to hotels, motels and other premises which they now have to rent on a temporary basis. We acknowledge that allowing full play to the concept of the responsibility and dignity of the adult prostitute may well require active consideration of treating prostitution exactly like any other business. There is, indeed, an argument that this course is the only way of ensuring that the sexual and other subordination of women who are prostitutes, will come to an end.

The idea that adults who engage in prostitution can and should be counted upon to take responsibility for themselves has led us to recommend cutting back the criminal prohibitions against procuring and living on the avails of prostitution. Only procuring which is effected by coercion or threats will be criminalized in the case of an adult. So, too, we stipulate that receiving financial support from an adult prostitute should be criminal only when that support is exacted by means of coercion or threats.

Where young persons are concerned, the emphasis of our recommendations is to provide strong protection against exploitation. Procuring children to engage in sexual activity for reward is made criminal even where no threats are used. So, too, is receiving support from the paid sexual activities of young persons. We have recommended adding to the *Criminal Code* a specific prohibition against engaging, or offering or attempting to engage, in sexual activity with a young person. However, we do not recommend criminalizing the behaviour of young persons, except to the extent that they come within the general prohibitions because of their own exploitation of other young persons.

The full dimensions of our recommendations will be explored in detail. One further point about the implications of the basic principles should be noted here. The full working out of these principles will in some cases require considerable social adjustment. In particular, the equality principle, even if accepted at the theoretical level, will still need for its full implementation, substantial reallocation of economic and social resources. There remains, too, a formidable task in re-education and reshaping of attitudes in certain sectors of society. These long range tasks cannot be accomplished by means of legislation. They require social will and commitment. We cannot delay legislation, however, until this process has been completed.

## Footnotes

- <sup>1</sup> John Stuart Mill *On Liberty* 1859. ed. E. Rapport, (Indianapolis: Hackett Publishing Co., 1978). So deep seated is this view that it is accepted by many socialists and social democrats.
- <sup>2</sup> The tendency in contemporary liberal thinking is to emphasize the importance of freedom of expression for the autonomous development of the individual. See the *Report of the Committee on Obscenity and Film Censorship*, Cambridge: Cambridge University Press, 1981 (the Williams Committee Report), at 53-7.
- <sup>3</sup> Mill, *On Liberty*, at 9.
- <sup>4</sup> *Ibid.*, at 9-10.
- <sup>5</sup> The uncertainty of its ambit in Mill's mind is revealed in the last chapter of his essay, *ibid.*, at 93-113.
- <sup>6</sup> See Robert Nozick, *Anarchy, State and Utopia*, 1981, Rowman and Littlefield.
- <sup>7</sup> H.L.A. Hart, *Law, Liberty and Morality*, (London: Oxford University Press, 1963), at 30-4.
- <sup>8</sup> See Joel Feinberg, "Pornography and the Criminal Law". In D. Copp and S. Wendell eds., *Pornography and Censorship*, (Buffalo: Prometheus Books, 1983), at 105.
- <sup>9</sup> Canadian Advisory Council on the Status of Women, *Prostitution in Canada*, Ottawa, 1984.
- <sup>10</sup> Williams, note 2, at 131-3.
- <sup>11</sup> *Ibid.*, at 112-4.
- <sup>12</sup> *Ibid.*, at 132.
- <sup>13</sup> *Ibid.*, at 123.
- <sup>14</sup> See *Brodie v. R.*, [1961] B.R. 610 (Que. C.A.) per Casey J.
- <sup>15</sup> For discussion of variants of the "conservative view", see W. Barnett, "Corruption of Morals - the Underlying Issue of the Pornography Commission Report", (1971) *Law and Social Order* 189, at 201-5.
- <sup>16</sup> As expounded in particular in Patrick Devlin, *The Enforcement of Morals*, London: Oxford University Press, 1965.
- <sup>17</sup> *Ibid.*, at 12-14.
- <sup>18</sup> *Ibid.*, at 12-18.
- <sup>19</sup> *Ibid.*, at 16-25.
- <sup>20</sup> Lord Devlin took the view that it was certainly legitimate to ask whether homosexuality is so abominable 'that its mere presence is an offence' (*ibid.*, at 17). Others have answered that question in the affirmative.
- <sup>21</sup> The liberal would not necessarily demur from legal restraint here, but would justify it on the ground of "harm" in the sense of public offence.
- <sup>22</sup> See the critique of Fred Berger, "Pornography, Sex and Censorship" in D. Copp and S. Wendell eds., *Pornography and Censorship* at 83-104.
- <sup>23</sup> *Ibid.*, at 89-9.
- <sup>24</sup> L. Clark, "Liberalism and Pornography" in D. Copp and S. Wendell eds., *Pornography and Censorship* at 53-7.
- <sup>25</sup> K. Barry, *Female Sexual Slavery*, (New York: Avon Books, 1979).
- <sup>26</sup> See Charnie Guettel, *Marxism and Feminism*, (Toronto: The Women's Press, 1974).
- <sup>27</sup> See for example Beatrice Faust, *Women, Sex and Pornography*, (Harmondsworth: Penguin Books, 1980, 180-9).



- <sup>28</sup> See Barry, *Female sexual slavery*. Not all feminists agree on the implications of decriminalization, with a majority favouring strict legal enforcement against male exploiters and educational and social programs to educate against prostitution, and a minority favouring treating adult prostitutes as individuals running a business, subject to normal legal rights and obligations which go with that.
- <sup>29</sup> See Diana E.H. Russell, "Pornography and the Women's Liberation Movement" in Laura Lederer ed. *Take Back the Night: Women on Pornography*, New York: Bantam Books 1980, at 301-6.
- <sup>30</sup> This has led some feminists to look at human rights mechanisms as the most productive route, because they are more sensitive to exploitation concerns.
- <sup>31</sup> Much of the most vigorous writing on the theme has been from the United States. See Lederer, *Take Back the Night: Women on Pornography*, at 237-58. See also "Colloquium: Violent Pornography: Degradation of Women versus Right of Free Speech" (1978), 8 N.Y.U. *Rev. Law and Soc. Change* at 181 *et seq.*
- <sup>32</sup> Although Mill recognized this, there is little in *On Liberty* which addresses the problem of balancing conflicting rights.
- <sup>33</sup> Clark, "Liberalism and Pornography", at 45-59.
- <sup>34</sup> Clark entertains doubt as to whether liberalism is adequate to the challenge of changing its conception of rights, *ibid.*, at 57-8.
- <sup>35</sup> *Ibid.*, 45-47. The right analysis is adopted by Clark from Isaiah Berlin, "Two Concepts of Liberty" in *Four Essays on Liberty*, 1969, London, at 118-172.
- <sup>36</sup> Clark, "Liberalism and Pornography".
- <sup>37</sup> *Ibid.*, at 48.
- <sup>38</sup> *Ibid.*, at 54-7.
- <sup>39</sup> K. Mahoney, "Obscenity, Morals and the Law: A Feminist Critique", paper presented to Law and Justice Beyond 1984 conference, Canada Institute for Administration of Justice, Ottawa, October, 1984 at 20.
- <sup>40</sup> *Ibid.*
- <sup>41</sup> Law Reform Commission of Canada, *Limits of the Criminal Law, Obscenity: A Test Case*. Ottawa, 1977.
- <sup>42</sup> Department of Justice, *Criminal Law in Canadian Society*, Ottawa, 1982.



## Chapter 3

# The Impact of the Charter of Rights and Freedoms and the Constitutional Division of Powers

### 1. Introduction

The development of recommendations on criminal and regulatory law in Canada must necessarily take place within the context of constitutional law and practice. In particular the recommendations must be sensitive to two elements in the Canadian constitutional system: (a) the existence of the *Charter of Rights and Freedoms* which represents the first attempt in Canada to enshrine a legal statement of basic rights and values in a fundamental constitutional document (a document which unlike ordinary statutory law is not subject solely to the sovereignty of Parliament); and (b) the division of powers established between the federal Parliament and the provincial legislatures within the structure of Canadian federalism by the *Constitution Act* (formerly the *British North America Act*).

The *Charter* is a very recent document which means that many of its practical implications have yet to be determined. Accordingly, any account of its operation in general and in particular contexts must be to some extent tentative and speculative. The division of powers within the Canadian Constitution is an issue which has exercised the courts since Confederation in 1867. There is accordingly a large body of case law on it, although changing and sometimes conflicting views on where the balance between federal and provincial power should lie, results in uncertainty in some areas. However, guidance is easier to find on the *Constitution Act* than it is on the *Charter*.

### 2. Canadian Charter of Rights and Freedoms

#### *Guarantee of Rights and Freedoms*

1. *The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

## *Fundamental Freedoms*

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

## *Equality Rights*

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

## *Application of Charter*

32. (1) This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

*The Charter of Rights and Freedoms* is very much a creature of the late twentieth century. Although section 2 of the *Charter* contains the traditional rights and freedoms which are recognized in all classical written constitutions (the “fundamental freedoms”: freedom of conscience and religion, of thought, belief, opinion and expression, of peaceful assembly and association) the *Charter* also reflects the more instrumental vision of the modern liberal state.

Thus it contains rights which represent, to one degree or another, the conscious desire of the Canadian polity to correct social injustices and inequalities. Section 15 recognizes both the equality of every individual “before and under the law”, and to “equal protection and equal benefit of the law” without discrimination on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. It also recognizes the need to exempt affirmative action programs designed to assist people who are disadvantaged by those attributes.

Certain groups whose rights and freedoms were considered to be in need of emphasis are specifically referred to in the document. Under section 28, for example, the rights and freedoms in it are “guaranteed equally to male and female persons”, and section 23 provides protection to minority linguistic groups in education. Certain economic rights are also recognized, in particular the right of citizens to move and gain a livelihood anywhere within the country, which is secured by section 6(2).

Finally, the *Charter* recognizes a series of legal rights, which include not only the general statement that “everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”, but also a series of more specific rights to protection by and within the criminal law process.<sup>1</sup>

The *Charter* recognizes a diverse range of rights. However, it also embodies the notion that rights are not absolute, but need to be balanced in some contexts against the greater claims of the community. Thus in section 1 the rights and freedoms set out in the *Charter* are guaranteed, “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. Moreover, as a result of political compromise during the constitutional negotiations leading to adoption of the *Charter*, section 33 was included giving Parliament and Provincial legislatures the power to override the fundamental freedoms in section 2, the legal rights set out in sections 7 to 14, and the equality rights in section 15. Accordingly, it is open to the Canadian government, or a particular provincial government, to abridge the rights included, if political or social conditions are considered to warrant such a step. This is subject to a requirement of express declaration of purpose.

By virtue of section 32, the *Charter* applies to the Parliament and government of Canada, and the legislatures and governments of the provinces. Constitutional opinion is divided over whether it governs the activities of private organizations, corporations or individuals.<sup>2</sup>

Although we are still in the early days of interpretation of the *Charter* by the courts, it does seem that a more or less standard pattern of analysis is emerging, at least at the appellate level. As one would expect given the terms of the *Charter*, the issue in *Charter* litigation will typically centre upon a claim that an individual's rights have been infringed by some form of state action, and a claim by the state, that the “infringement” is justified under section 1. Experience so far suggests that the courts first will require the plaintiff to



establish a *prima facie* infringement of right or rights, and then require the state to demonstrate that the infringement can be justified under the first section. If the plaintiff succeeds at both stages the legislation in question will be held, to the extent of its inconsistency with the *Charter*, “of no force or effect”.

The record of the courts to date suggests that there is some ambivalence in addressing the issue of infringement, in particular the scope to be given to the right or rights involved. Thus, in cases involving claims of infringement of freedom of expression, some courts have tended to include all forms of “expression” as falling within the right in section 2, leaving it to the state to argue why the particular form of expression needs to be prohibited or limited.<sup>3</sup> Other courts, however, have given freedom of expression limited scope, for example, excluding commercial expression.<sup>4</sup>

The Courts have been less consistent in dealing with the issue of justification of the infringement. However, it seems that the basic questions are clear: (a) Is the infringement reasonable, in the sense that it “can be demonstrably justified in a free and democratic society”? and (b) Is it “prescribed by-law”? On question (b) the European Court of Justice has interpreted the European Convention on Human Rights and Fundamental Freedoms, from which the term “prescribed by-law” in the *Charter* was borrowed, to emphasize the need for accessibility by the citizen to the particular law and the use of precise language so that the law is comprehensible to the citizen as a basis for regulating his conduct.<sup>5</sup> The need for accessibility mentioned in that case has already struck a responsive chord with one Canadian appeal court.<sup>6</sup>

In addressing question (a) the courts are engaged in the function of balancing the right or freedom in question, and the purposes underlying the infringement. To assist in this process there is reason to believe that the courts will divide the legitimacy of the infringement question into a series of sub-issues related to: (i) the nature of the purposes for the infringement; (ii) the legitimacy of those purposes; (iii) whether and to what extent they are furthered by the legislation; (iv) the importance of those purposes; (v) the seriousness of the infringement; (vi) the availability of less drastic means; and (vii) whether the infringement is, in the circumstances, too high a price for the community to pay.

In addressing issue (i) it has been suggested that the courts will restrict the government to raising the purposes stated at the time of enactment of the legislation, ignoring rationalizations after the fact.<sup>7</sup> As to issue (ii), legitimacy will probably not be difficult for the government to establish, as long as the evident purpose of the legislation or action is not to attack the very purpose of the right or freedom in question. Under issue (iii) the courts should be able to ensure that the government is not deflecting attention from the true and unstated purposes of the legislation, or using legislation for legitimate purposes which only advances those purposes minimally.



Issue (iv) provides the courts with an opportunity to distinguish and rank the stated purposes of government action. It is likely, for example, that legislation which enhances or protects constitutional values or those inherent in our general law will draw greater support than that which embodies novel or seemingly repressive principles. The courts will also be enabled by issue (v) to make qualitative distinctions, this time on the basis of the seriousness of the infringement. For example in relation to a case involving an infringement of equality rights the court would be concerned with the characteristics of the group allegedly affected by the legislation, (e.g. age, race, sex, etc.) and of the interests at stake. Canadian courts have already indicated that they are ready to distinguish serious and minor infringements.<sup>8</sup> In litigation under section 15 (the equality section) it is not fanciful to expect that the courts will be far more protective of the rights of groups and attributes which are typically the target of discriminating conduct and attitudes, i.e. those specifically mentioned in the section rather than of those which are associated with anti-social or exploitative behaviour of the type which would be associated, for example, with procurers and pimps.

Under issue (vi) the courts will be able to determine whether the government might have resorted to expedients which would have avoided impinging on protected rights, although there may well be some reluctance in “second guessing” governments on this. Finally issue (vii) raises the ultimate question of where the balance between the right or freedom at stake and the purposes of the impugned legislation should lie. This involves taking all of the preceding issues into account. It is too early to determine whether the Canadian courts will follow their U.S. counterparts in the United States and establish a formula to assist (or complicate) this process. Whatever aid to analysis is utilized, however, the balancing process should take place within the context of Canadian constitutional, political, legal and social values rather than those of other countries.

### 3. The Division of Powers

The Canadian Constitution divides the power to make laws between the federal Parliament and the ten provincial legislatures in relation to “matters” that fall within two lists of “classes of subject” set out in the *Constitution Act* of 1867.<sup>9</sup> Under section 91 of that *Act*, the following subjects which fall within federal jurisdiction are:

- (a) “regulation of trade and commerce” [section 91(2)];
- (b) “the postal service” [section 91(5)];
- (c) “criminal law ... including the procedure in criminal matters” [section 91(27)]; and,
- (d) “works and undertakings connecting [one] province with any other or others of the provinces, or extending beyond the limits of the province” [section 91(29) and 92(10)(a)].

Section 92 gives the provinces jurisdiction over a list of subjects which includes:

- (a) "property and civil rights in the province" [section 92(13)];
- (b) "local works and undertakings" [section 92(10)];
- (c) "the imposition of punishment by fine, penalty or imprisonment for enforcing any laws of the province" falling within its jurisdiction by [section 92(15)]; and,
- (d) "generally all matters of a merely local or private nature in the province" [section 92(16)].

The power to make laws in relation to "matters" that do not "come within" any of the enumerated "classes of subjects" (known as the "peace, order and good government power") is given to the federal Parliament by the preamble to section 91.

These constitutional provisions have naturally been subject to judicial interpretation since 1867. Accordingly, judicial decisions provide some (although not always clear and definitive) guidance on the ambit of the "classes of subjects" and the possibility of overlap between federal and provincial powers, which has relevance to both pornography and prostitution. In particular, the decisions assist in determining the relative ambits of the regulatory power of both levels of government to regulate commercial activities; the relationship of the federal criminal law power to the provincial power to sanction breaches of provincial law; the ability of the provinces to act out of concern about morality; and the location of jurisdiction over matters such as Customs, Broadcasting and Communications, which are not expressly referred to in the *Constitution Act*.

The possibility of conflict between section 91(2) (regulation of trade and commerce) and section 92(13) (property and civil rights) has been reduced by the confining of section 91(2) to the regulation of international and interprovincial trade, and of general trade and commerce throughout the dominion. The power to regulate local trades or businesses within a province lies with provincial legislatures. Although the criminal law power is clearly within the federal domain by section 91(27), it is accepted that the provinces, by virtue of section 92(15), have the power to sanction transgressions of valid provincial law, for example, highway traffic and public health legislation, and in this sense to enact "offences". Moreover, there is no bar to provincial legislatures acting out of a concern for morality. The provinces may legislate morality incidentally as part of a purpose which clearly falls within their jurisdictions, for example, "property and civil rights in the province" and "matters of a merely local or private nature." It is thus legitimate for a province to regulate a business within the province, in part for moral reasons. Provincial attempts to regulate film distribution, sex stores, massage parlours and escort services has been upheld as legitimate exercises of the regulatory power, although the attempts reflect in part a moral impulse. What the provinces clearly cannot do is to legislate the proscription of immoral conduct.



The *Constitution Act* of 1867 makes no reference to the place of certain activities within the division of powers. These were either assumed to fall within a more general category, or were activities which were unknown to the legislators of that era. Customs activity was, of course, well known in 1867. By judicial interpretation it has been placed firmly under federal jurisdiction, as a specific example of “the regulation of trade and commerce” in section 91(2). Broadcasting and electronic communications were unknown at that time. Because of the national and, indeed, international dimensions of this type of activity the courts have reposed jurisdiction in the federal Parliament. However, left unclear is whether the source of the jurisdiction is the “peace, order and good government” power in the preamble to section 91, or the power to regulate interprovincial undertakings in section 92(10)(2).

As the discussion above on morality shows, federal and provincial jurisdiction may overlap in certain areas. The courts have taken the position that as far as possible the jurisdiction of each should be recognized as operable unless there is a real conflict, in which case the federal jurisdiction predominates. In approaching cases in which conflict exists, the Supreme Court of Canada in particular has taken pains to confine the area of conflict as narrowly as possible.<sup>10</sup>

An account of general constitutional considerations would not be complete without reference to the constitutional position of municipalities. Municipalities are corporations which have been created by a provincial government. They have no independent constitutional status. As a consequence, they can exercise only that power which is delegated to them. Any by-law which is passed by a municipal government without enabling legislation, is invalid.

Whether or not a particular kind of power is delegated to the municipalities within a province is governed by a number of factors, including the division of law-making power between Parliament and the provincial legislatures. It is by no means certain, therefore, that a province can or will give municipalities the power they request. Even if a particular power could be delegated, a provincial government may decide that the matter in question should not be controlled at the local level. However, in the areas of pornography and prostitution, the major issue has been whether the provinces have the constitutional authority to legislate. There is no evidence that the provinces have hindered any attempts by municipalities to control these problems by refusing to delegate authority to them. It is apparent that all municipalities have authority to license and otherwise regulate businesses and to zone land use within their boundaries. They also have a limited power to control the highways and public places within their boundaries, to control nuisances and to legislate for the health, safety, welfare and morality of their inhabitants.

As we shall point out later, the main sources of challenge by the courts to the exercise by municipalities of their powers in the areas of pornography and prostitution, has been to strike down provisions which are vague<sup>11</sup> or which, while they have the stated purpose or the appearance of regulation, amount to an attempt to proscribe a particular activity or type of conduct, in effect to enact criminal law.<sup>12</sup>



As will be apparent from our discussion of the *Charter* and the division of legislative powers, attempts to address the issues of pornography and prostitution through law reform are necessarily complex. This intricacy is compounded by the complexity of the issues themselves. The present realities of the issues are addressed in subsequent parts of the Report.

## Footnotes

- <sup>1</sup> *The Constitution Act*, 1982, ss. 7-14 (enacted by the *Canada Act*, 1982 (U.K.), c. 11)
- <sup>2</sup> See K. Swinton, "Application of the Canadian Charter of Rights and Freedoms (ss. 30, 21, 32)" in W. Tarnopolsky and G. Beaudoin eds., *The Canadian Charter of Rights and Freedoms: A Commentary* (Toronto: Butterworths, 1982) at 44-8.
- <sup>3</sup> See for example, *Regina and Federal Republic of Germany v. Rauca* (1983), 34 C.R. (3d) 97 (Ont. C.A.); *In re Ontario Film and Video Appreciation Society v. Ontario Board of Censors* (1983), C.R. (3d) 7 (Ont. Div. Ct.), appeal dismissed (1984), 5 D.L.R.(4th) 766 (Ont.C.A.).
- <sup>4</sup> See *Koumoudouros v. Metro Toronto* (1984), 6 D.L.R. (4th) 523 (Ont. Div. Ct.); *Schinder v. Deputy Minister, Revenue Canada, Customs and Excise* (unreported), 1983, (Ont. Co. Ct.).
- <sup>5</sup> See *The Sunday Times v. The United Kingdom*, [1979] 2 E.H.R.R. 245 (E.C.J.).
- <sup>6</sup> See in *Re Ontario Film and Video Appreciation Society*, *supra*, note 3.
- <sup>7</sup> See W. Conklin, "Interpreting and Analysing the Limitations Clause: An Analysis of Section 1" (1982) 4 *Sup. Ct. L. Rev.* at 75.
- <sup>8</sup> See *Re Smith* (1983), 34 C.R. (3d) 52 (Ont. H.C.) *Southam Inc. v. Hunter* (1985), 11 D.L.R. (4th) 641 (S.C.C.).
- <sup>9</sup> *The Constitution Act*, 1867.
- <sup>10</sup> See *Multiple Access Ltd. v. McCutcheon* (1983), 138 D.L.R. (3d) 1 (S.C.C.).
- <sup>11</sup> See *Hamilton Independent Variety and Confectionery Store v. City of Hamilton* (1983), 137 D.L.R. (3d) 499 (Ont.C.A.).
- <sup>12</sup> *R. v. Westendorp* (1983), 144 D.L.R. (3d) 259 (S.C.C.).





## Part II

# Pornography



## Section I

### Pornography as a Social Issue





## Chapter 4

# What is Pornography?

### 1. Introduction

Among other tasks assigned to it, our Committee was asked to study the problems associated with pornography, including access to pornography, its effects, and what is considered to be pornographic in Canada. The terms of reference for the Committee did not contain any definition of the term “pornography”. Although the term is widely used in popular and academic literature, it does not appear in Canadian criminal law, nor is this term used in other federal legislation dealing with the control of offensive material.

Accordingly, we had first to consider whether we would formulate our own working definition of pornography for purposes of the public hearings, so that interested citizens would know exactly what we wanted to hear about. We decided not to publish such a working definition at the outset of our proceedings, because we believed that an essential part of our work was to hear what Canadians thought was encompassed in the term. Therefore, in the Committee’s *Issues Paper*, published in 1983 to promote discussion at the public hearings, we included a description of the present terminology used in federal legislation to describe prohibited material, but did not suggest a definition of pornography. At the public hearings, we received many thoughtful and well-reasoned submissions about what should be considered pornography. The main themes of these presentations will be described below.

Firstly, however, let us examine the terminology used in the present law, and discuss the implications of that terminology for public policy.

### 2. The Definition in the Present Law

The *Criminal Code* does not use the word pornography in its prohibitions dealing with offensive material. Subsections 159(1) and 159(2)(a) deal with the production, distribution and sale of “obscene” matter. Subsection 159(8) provides that for purposes of the *Code*, any publication “a dominant characteristic of which is the undue exploitation of sex, or of sex and any one

or more of the following subjects, namely crime, horror, cruelty and violence” is deemed to be obscene.

Certain other sections of the *Code* also use the term obscene. Section 160 permits the seizure, forfeiture and disposal of obscene material. Section 161 prohibits distributors from requiring retailers to accept for sale obscene materials along with others, in a so-called “tied sale” arrangement.

In some sections, obscene is used in conjunction with other terms. Section 163 creates the offence of presenting or allowing to be presented “an immoral, indecent, or obscene performance, entertainment or representation”. Section 164 makes it an offence to use the mails to transmit or deliver anything that is “obscene, immoral or scurrilous”.

In all these sections the key test invalues the application of “community-standards”. This community standards test developed in response to the use of the term “undue” in subsection 159(8). The question posed by the community standards test is, essentially, whether the exploitation of sex or of sex and crime, horror, cruelty or violence, is undue in the sense that it exceeds the contemporary Canadian community standards of tolerance. As we shall discuss below in greater detail, the application of this test, whether by judges or juries, can make the interpretation of this provision quite unpredictable.

Other provisions of the *Criminal Code* do not use “obscene” at all. Subsection 159(2) of the *Code* makes it an offence to exhibit a disgusting object or an indecent show. Subsection 162(1) makes it an offence to print or publish in relation to any judicial proceedings “any indecent matter or indecent medical, surgical or physiological details, being matter or details that, if published, are calculated to injure public morals.” This use of an injury to public morals test in subsection 162(1) is the only use of such a test in the *Criminal Code* treatment of prohibited materials.

The sections described above feature terminology which is very general. By contrast, a few sections of the *Criminal Code* describe quite particularly the kind of material which will attract the criminal sanction. Take, for example, subsection 162(2). The subsection makes it an offence to publish, in relation to any judicial proceedings for dissolution of a marriage, nullity of marriage, judicial separation or restoration of conjugal rights, any particulars other than the names, addresses and occupations of the parties and witnesses, a concise statement of the charges, defences and countercharges in support of which evidence has been given, submissions on points of law, the summing up of the judge, the finding of the jury and the judgment and observations of the court.

All of the sections dealing with obscene and indecent materials appear in the part of the *Criminal Code* entitled “Offences Tending to Corrupt Morals.”

In Schedule C to the *Customs Tariff*<sup>1</sup> we find a prohibition against the importation into Canada of books, printed paper, drawings, paintings, prints, photographs or representations of any kind of an immoral or indecent



character. It has been held that this language, too, is to be interpreted on the basis of the community standards of tolerance test. In the guidelines issued to Customs officers to assist in the application of this test, we find a rare use of the actual term pornography. In these guidelines, “hard core pornographic pictures” are described as ones which lewdly and explicitly display the male and female sexual organs, sexual intercourse, sexual perversions and acts like bestiality. Prohibited reading material contains “explicit hard-core fictional text dedicated entirely to sexual exploitation and containing no redeeming features.”<sup>2</sup>

Regulations made under the *Broadcasting Act*<sup>3</sup> present yet another variation on this language. The regulations for AM and FM radio licensees provide that no station or network operator shall broadcast anything contrary to law, or any “obscene, indecent or profane language”.<sup>4</sup> The comparable regulations for television licensees prohibit broadcast of anything that is contrary to law or any “obscene, indecent or profane language or pictorial representation.”<sup>5</sup>

From the foregoing review of the terminology employed in the various legislative provisions aimed at what may be popularly known as pornography, a number of observations can be drawn. One of the clear impressions is of the lack of uniformity in the terminology. However, although there is a diversity of language, it is noticeable that many of the main provisions refer to obscenity or indecency. The title heading in the section of the *Criminal Code* containing most of these provisions makes it plain that these terms, and these offences, deal with what the legislators regarded as “corruption of morals”.

### 3. What is Obscenity?

This Committee has received many interesting and forceful submissions criticizing the use of the term obscene in the present criminal law. The emphasis of this terminology is almost exclusively on sexual morality (or immorality). This emphasis is captured well by this description of obscenity taken from an early Canadian decision: “something offensive to modesty or decency, or expressing or suggesting unchaste or lustful ideas or being impure, indecent or lewd”.<sup>6</sup> This interpretation echoes the dictionary definition of obscenity: indecency, lewdness, foulness, loathsomeness.<sup>7</sup> Indeed, as was mentioned in the public hearings, the Latin root of obscenity, “obscenus”, means foul, repulsive, filthy, morally impure, or indecent.<sup>8</sup>

The emphasis on sexual immorality is at the heart of United States jurisprudence on obscenity. The touchstone for obscenity is that enunciated in *Miller v. California*:

...whether “the average person, applying the contemporary community standards” would find that the work taken as a whole, appeals to the prurient interest, ... whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and ... whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.<sup>9</sup>



Only material which is within that definition is outside the protection of the First Amendment guarantee of freedom of speech.

However, obscenity has not always been identified with the sexually impure. One of the definitions of its Latin root is “ill-omened, unpropitious”<sup>10</sup>, and it has been suggested that its English counterpart originally had only this meaning. In Shakespeare’s day, we are told, the term obscene meant primarily “offensive to the senses, filthy, foul, disgusting”. Only secondarily did it refer to what was offensive to modesty or decency.<sup>11</sup>

In assessing the terminology used in the present law, these historical antecedents of the meaning of obscene are well worth keeping in mind. The main focus of the law does indeed seem to be on the moral, or sexual, aspect of the definition, but there is still an element of the definition which reflects the more general idea of offence and disgust. Consider, for example, the double elements in the definition of obscene, namely sex and crime, sex and horror, sex and cruelty and sex and violence. In Bill C-19 proposed by the Minister of Justice in 1983, the elements of violence and cruelty were detached from the element of sex, thus emphasizing the dual nature of the obscenity definition. The omnibus bill proposed a new definition of obscene:

... any matter or thing is obscene where a dominant characteristic of the matter or thing is the undue exploitation of any one or more of the following subjects, namely, sex, violence, crime, horror or cruelty through degrading representations of a male or female person or in any other manner.<sup>12</sup>

We note that although the sense of obscenity involves both the element of moral impurity and the element of disgust or offence, these two elements are not mutually exclusive. To many, the disgust and offence category is a wide one, capable of including offensive sexual material as well as that which is offensive but not sexual. During the course of our work, we saw an image that most particularly seems to be within this category that is offensive without being sexual. The scene is a highway, located in flat country. Military figures are present, moving about in a purposeless way. A large mechanized vehicle with a roller on the front comes down the road toward the viewer and runs over one of the figures who is standing in its path, with his back to the audience. We see first the grisly scene of the machine rolling over the human being, and subsequently, the gory shape on the road which is all that remains of the victim.<sup>13</sup> There was, to our minds, nothing remotely sexual in content or effect about that scene, and yet it was powerfully offensive.

The Williams Committee has said of the term obscenity that “it principally expresses an intense or extreme version of ... ‘offensiveness’”.<sup>14</sup> The Report of that Committee continues:

It may be that it particularly emphasizes the most strongly aversive element in that notion, the idea of an object’s being repulsive or disgusting: that certainly seems to be the point when a person or animal is said to be, for instance, “obscenely” ugly or fat.<sup>15</sup>

The Williams Committee, quite rightly in our view, points out that there will be obscene things which are not pornographic, illustrating its remark with the observation that it would be obscene to exhibit deformed people at a funfair, but not, in its view, pornographic to do so.<sup>16</sup>

The Williams Committee also trenchantly observes:

We suspect that the word “obscene” may now be worn out, and past any useful employment at all. It is certainly too exhausted to do any more work in the courts.<sup>17</sup>

We are strongly inclined towards this view. On the one hand, it seems that the “offence” or “disgust” view of the “obscenity” meaning, with its strong subjective element, may cast the net of the criminal law too widely. It is not everything that disgusts or offends that can or should be prohibited; and even when the *Code* seeks specificity by such formulations as “undue” exploitation of violence or sex and cruelty, it is still, in our view, very sweeping. On the other hand, a focus on sexual morality, either alone or primarily, seems to be missing the essence of what is objectionable about much contemporary material. In the course of our hearings and deliberations, therefore, we found ourselves becoming more and more receptive towards the argument that there should be an overhaul of the terminology used in the *Criminal Code*.

Having reached the point of agreeing that an overhaul is in order, however, we must next address the question of what is more appropriate terminology. Significant numbers of people urged that the term “pornography” be adopted as the keystone of the criminal law, and proposed various quite particular definitions of the term. These recommendations, of course, return us to the discussion with which we began this chapter.

## 4. What is Pornography?

Even more so than in the case of obscenity, the problem of defining pornography is compounded by the vast and varied popular usage of the term. We suspect that the very sound of the word pornography makes it attractive to those who are describing material that ranges from the “naughty”, “racy” or “off-colour” to the “hard-core” depictions of violence and degradation. The abbreviation “porn” seems to be welcomed by many as an addition to the litany of four-letter words, in the company of such stalwarts as “muck”, “dirt” and “smut”. The versatile prefix “porno” combines well to form such amusing, yet appropriate, terms as “pornokitsch” (for pornography with “artistic” pretensions), pornocrat (an inhabitant of the pornocracy which some see established in contemporary culture) and pornostrasse (a street featuring outlets reserved for the sale of pornographic material).

The very wealth of popular applications for the term pornography points to one very interesting dilemma for those who seek to legislate in this area. Almost everyone could say of pornography, in company with Justice Potter Stewart of the United States Supreme Court, “I know it when I see it”.<sup>18</sup>



However, because it depends on the standards and sensibilities of the viewer, such a subjective approach to the definitional task would be doomed to failure in the courts.

In the course of our public hearings, we became aware of the wide range of opinion among Canadians about what is offensive. At what could be called the conservative end of the spectrum are views like those of two witnesses at the Edmonton hearings, who want the legal definition of pornography to include any depiction or occurrence of sexual, physical relations outside heterosexual marriage; and those of REAL Women of Canada whose definition of pornographic contains material setting forth representations or descriptions of a person in a nude or suggestive pose or of sexual intercourse, and the promotion, exploitation, glorification or glamorization of promiscuous conduct. At the other end of the spectrum is one memorable presenter at the Montréal hearings who regarded everything as acceptable (not pornographic), except for sexually explicit portrayals of children and representations of sex with the dead. The majority of views, of course, lay somewhere between these two extremes. We describe them in more detail below.

Many legal definitions of obscenity have attempted to take account of this subjective element by including a judgment factor to be applied by courts in determining what is criminal. The *Criminal Code* of Canada, as has been mentioned, uses the community standards of tolerance test, triggered by the phrase "undue exploitation" in the *Code*; the American jurisprudence also refers to the average person applying contemporary community standards. These formulations attempt to account for the role of taste and sensibility in determining what should be prohibited, while trying to limit that subjective component to the views of the mainstream of the community.

We are not convinced that this sort of accommodation to taste on the subjective element is necessary or desirable in the criminal law. Many people at the hearings criticized the community standards test referred to above as unworkable. We think that this component tells us more about the viewer, or hypothetical viewer, of the material than about the material itself. Although we are concerned that persons not be forced to look at or to consume material which they find offensive, we think that provisions aimed at that problem are a better solution than a definition of pornography which contains as a key element, this subjective approach.

We are not concerned here with refining the popular use and extension of the term pornography. We are, however, concerned about finding a definition which will assist in determining what might properly be the subject of legislative control.

A useful starting point for this inquiry is, once again, an examination of the roots of the term. The Shorter Oxford Dictionary on historical principles describes pornography as a description of the life, manners, etc. of prostitutes and their patrons; hence, the expression or suggestion of obscene or unchaste subjects in literature or art. The term is derived from the Greek words for

“harlot” and “writing”.<sup>19</sup> These origins should remind us of at least one aspect of “pornography” as the term now is used. The term refers to something “graphic”, a representation. An object which is not a representation (underwear, for example) could not be said to be pornographic, whether one is using that term in a popular or a more specialized way.<sup>20</sup>

Our review of definitions of pornography given to us at the public hearings, and in the literature, has led us to the conclusion that there are really two types of pornography being discussed by those who have explored this area. Both of these types are encompassed within this general definition offered by the Williams Committee:

Pornography essentially involves making public in words, pictures or theatrical performance, the fulfilment of fantasy images of sex or violence. In some cases the images are forbidden acts: so it is with images of violence. In other cases, the line that is transgressed is only that between private and public; the acts represented in the images would be all right in private, but the same acts would be objectionable in public.<sup>21</sup>

The notion of a line between private and public takes its meaning from the fact that it is sexual conduct that is at issue. Pornography is said to cross the line because it makes available for voyeuristic interest some sexual act of a private kind. The act is private to its participants, but cast into the public because of the medium in which it is portrayed.

From this common starting point, however, there is some divergence. One sort of pornography is that which could be said to be merely sexually explicit, with very little emphasis on violence or forbidden (in the sense of illegal) acts. As the emphasis on violence or illegality increases, we move to another type of pornography, described by feminist thinkers such as Jillian Riddington and Helen Longino. The real message of such material is said to be sexual exploitation and degradation of its participants, with portrayal of men as aggressors and women as subordinate.

We divide this material into two types here largely for purposes of discussion. Practically speaking, there can be no real dividing line between the two, since interpretation of a particular image depends to such a great degree on shades of meaning and implication, and on what a particular viewer brings to it. Indeed, some feminist observers say that all pornography, even that which is “merely” sexually explicit, conveys these messages of sexual exploitation and degradation. Consider, for example, the photographs in so-called soft-core pornography involving no representations of violence. It was pointed out that these images may portray women as ever eager to accommodate men’s sexual pleasure, with no mind or inclinations apart from that. Their eyes are vacant, their mouths slightly open, so that they look mindless. They are shown as nude or partially clad. Males, when they appear at all, are invariably clothed. Women are not shown in poses of mutually enjoyed sex, but often by themselves, displayed as objects for the male onlooker, who is the reader. Their bodies may be divided into zones or pieces by garter belts, the hems of robes, and so on, so that they resemble the “meat chart” at the grocery store meat



counter. Their pubic areas are often shaved into “acceptable” shapes, and the labia turned back to provide a better display of their sexual organs. All of these images from so-called soft-core pornography are cited by many witnesses as demeaning to women.

The scheme of describing two types of pornography is adopted here merely to facilitate elaboration and description of what it is that people are saying merits, and does not merit, the attention of the law.

The material which is “merely sexually explicit” we see best described by a definition developed by the Williams Committee, which we have modified to a certain extent. The second type of material is well described by Longino, Riddington, and Dworkin and MacKinnon. We discuss each of these approaches in turn.

The Williams Committee proposes as its own working definition of pornography the following:

...a pornographic representation is one that combines two features: it has a certain function or intention, to arouse its audience sexually, and also a certain content, explicit representations of sexual material (organs, postures, activity, etc.). A work has to have both this function and this content to be a piece of pornography.<sup>22</sup>

Many people think that pornography has an element of explicit sex to it, suggested by the terms “skin flicks”, “nudie magazines” and the like. While somewhat more obscurely, in some minds there is probably also a connection between pornography and sexual arousal. Here again, everyday language is instructive: pornography may be seen as a “turn on”, something to “get off on”, and so on. The Williams Committee definition does, then, encompass a great deal, if not most, of what the ordinary person would think of as pornography.

For this reason, we think that this definition, with the change which we discuss below, usefully represents one of the types of pornography with which the lawmaker must deal. However, having said that, we nonetheless hasten to point out that from the point of view of the lawmaker, the Williams Committee definition presents a major problem.

The difficulty with the Williams definition as a basis for legislative drafting, is its reliance on an intention to stimulate sexually its consumers, as an element of pornography. We think that the element of sexual stimulation was included in this working definition because of the concern of the Committee for what can be called “the context problem”. It was pointed out during the public hearings of our Committee, that an image found offensive in one context, may be quite acceptable in another: a detailed photograph of sexual organs may quite inoffensively be included in a medical textbook, but would offend in a teen movie magazine. A photo of a naked infant being bathed by his or her mother would be acceptable, but a photo of a naked infant, surrounded in a threatening way by leather-clad adults, might not be. In

the former case, the issue is about the context in which the photograph appears. In the latter, it is a concern for the context, within the photograph, in which the nude infant is located.

In both cases, persons looking at the photographs will be making certain inferences about what is going on in the photograph and, perhaps, in the mind of its producer. These inferences have a lot to do with someone's determination of whether or not something is pornographic. An observer may infer, for example, that the photograph in the movie magazine is there to arouse the magazine's reader. He or she may infer that the photo of the baby with the leather-clad figures is intended to arouse the reader, at least, in part, because of some other inference, namely that the baby may have something to do with the arousal of the leather-clad figures. Very few observers would infer that the medical book or the photo of the mother bathing her infant, were intended to stimulate sexually the viewer. Thus the impression in the mind of the observer about the presence or absence of intention to stimulate the consumer of the material, will have a bearing on the observer's conclusion about whether material is pornographic. This type of impression is not, of course, the only one which influences the observer's decision about what is pornographic, but it is a significant one.

However, to focus on an intent to promote sexual stimulation as a test in law, simply because it is an element of the "context" analysis, is fraught with difficulty. Our observations of the current market in various types of pornographic material, lead us to suggest that the intent of the makers of most of it has a great deal to do with generating profits, and not very much at all to do with sexual stimulation. Much of this material is stilted, tawdry, and merely gymnastic, and any sexual stimulation connected with it would more likely happen because of the existing mindset of the consumer, than because of the intention of the producer. Any criminal offence which had as a necessary element an intent to bring about sexual stimulation, would, in our view, result in very few convictions. For this reason, we have restricted our use of a "sexual situation" test to only one section of our suggested reforms.

Although we do not think that the Williams Committee definition is an appropriate foundation for the criminal law, we consider that it would be a reasonably popular definition of the sexually explicit sort of pornography. It might be made more exact by the introduction of a small refinement. Thus, we would say that a work is pornographic if it combines the two features of explicit sexual representations (content) and an *apparent or purported* intention to arouse its audience sexually. This formulation is not wholly satisfying because as we have discussed earlier, the emphasis would be on the inference drawn by the observer, and each person's inference would be different. However, to leave only the content branch of the definition means that quite straightforward clinical material in an anatomy textbook would be regarded as pornographic, and that accords with neither the popular understanding nor the proper policies of the criminal law. To depart from an intent standard in favour of an effect standard would not really serve either. If effect were the test, then sexually explicit material which appalled or disgusted



rather than aroused would not be within the range, even if the maker's actual intent had been to stimulate.

As for our reservations about the definition for purposes of the criminal law, we have created a scheme of criminal law which does not depend on having first of all elaborated a satisfactory definition of "pornography". We have concentrated on identifying the kinds and types of representations which we believe merit a criminal sanction, without striving to attach to one or the other of these types any particular legal or popular label. The terms obscenity, pornography and erotica all have such an elaborate web of primary, secondary and popular meanings, and so many different connotations dependent on the background of the particular person, that we have decided to avoid them for purposes of the criminal law. Similarly, where we believe that context should be taken into account in determining whether to impose a criminal sanction, we have spelled out what we think should be the defence, rather than relying on the presence or absence of an intent to stimulate sexually.

This popular or general definition of pornography, as we have said above, really does not take account of what some persons appearing before us have called "the new pornography". In the terms of the description in the Williams Committee, its images are fantasy images of sex and violence, which involve forbidden acts of violence.

Although these kinds of images might be included in the broad definition, there is almost no real profit in doing so. In fact, to include them would be to submerge them in the general, and to blunt the meaning which these images have assumed in the contemporary pornography debate. Accordingly, we consider it highly worthwhile to study this type of material separately, and to explore the popular definition of it, so that we can understand its implications for lawmaking. The origin of the word pornography in the classical Greek, meaning a description of the life and manner of prostitutes and their patrons, is one point of departure for those who theorize about the new pornography. From this root, it is argued that in pornography, women are graphically depicted as whores by nature. All women are demeaned by such a portrayal, and the humanity and aspirations of all women are circumscribed within this narrow compass.

Helen Longino defines pornography in the sense that we have been discussing. After pointing out that not all sexually explicit material is pornography, nor is all material which contains representations of sexual abuse and degradation pornography, Longino continues:

What makes a work a work of pornography, then, is not simply its representation of degrading and abusive sexual encounters, but its implicit, if not explicit, approval and recommendation of sexual behaviour that is immoral, i.e., that physically or psychologically violates the personhood of one of the participants. Pornography, then, is verbal or pictorial material which represents or describes sexual behaviour that is degrading or abusive to one or more of the participants *in such a way as to endorse the degradation*. (emphasis in original)<sup>23</sup>



Longino writes that behaviour that is degrading or abusive includes physical harm or abuse, and physical or psychological coercion. She would also classify as degrading “behaviour which ignores or devalues the real interests, desires, and experiences of one or more participants in any way.”<sup>24</sup> We were referred to this definition in the course of the public hearings, as well as to a similar formulation by Jillian Riddington:

a presentation whether live, simulated, verbal, pictorial, filmed or videotaped, or otherwise represented, of sexual behaviour in which one or more participants are coerced overtly or implicitly, into participation; or are injured or abused physically or psychologically; or in which an imbalance of power is obvious, or implied by virtue of the immature age of any participant or by contextual aspects of the representation, and in which such behaviour can be taken to be advocated or endorsed.<sup>25</sup>

This approach to pornography has been given legislative expression in a by-law passed by the City of Indianapolis to control pornography.

The by-law defines “pornography” as follows:

Pornography shall mean the sexually explicit subordination of women, graphically depicted, whether in pictures or in words, that includes one or more of the following:

- (1) women are presented as sexual objects who enjoy pain or humiliation; or
- (2) women are presented as sexual objects who experience sexual pleasure in being raped; or
- (3) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or as dismembered or truncated or fragmented or severed into body parts; or
- (4) women are presented being penetrated by objects or animals; or
- (5) women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy and inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.<sup>26</sup>

The drafters of the Indianapolis Ordinance, Andrea Dworkin and Catharine MacKinnon, also drafted a by-law for the City of Minneapolis, which was passed by Council but not approved by the Mayor. The Minneapolis by-law includes, besides those elements set out above, these four:

- (i) women are presented dehumanized as sexual objects, things or commodities;
- (ii) women are presented in postures of sexual submission;
- (iii) women’s body parts — including but not limited to vaginas, breasts and buttocks — are exhibited, such that women are reduced to those parts;
- (iv) women are presented as whores by nature.<sup>27</sup>

Although these two definitions are framed in terms of depictions of women, both by-laws also provide that the use of men, children or transsexuals in the place of women in these depictions is also pornography.

One of the crucial components of thinking behind these definitions of pornography is the association between pornography and misogyny, or woman-hating. The architects of the Indianapolis by-law, Andrea Dworkin and Catharine MacKinnon, contend that over the ages, the influence of pornography on men who rule societies has produced misogynist institutions. Only now that changes in technology and the market have brought pornography into widespread circulation have we begun to appreciate this connection.<sup>28</sup> Others may argue that misogyny is expressed in pornography, but not created by it. Whichever argument is advanced, there is said to be a clear and unmistakable link between pornography and women-hating.

What is common to both of these approaches in viewing the relationship between pornography and misogyny, is that they see pornography as part of a political problem, relating to power imbalances in society. As such, it is a manifestation of a moral problem, taking the term "moral" in its wider sense, and not merely an issue of sexual morality. The point is made that use of the term obscenity, with its connotations of sexual morality, at best confines the problem too narrowly. At worst, it misstates its essential nature. Accordingly, some of the persons holding this view wish to replace obscenity in the *Criminal Code* with pornography, giving that term a definition consistent with the Dworkin/MacKinnon theory.

In our view, this theoretical approach to pornography (or to the "new pornography") is a valuable contribution to the debate. We think that the shape of the law should be taken not just from the general understanding of pornography expressed in our reworking of the Williams Committee's definition, but also from an awareness of the particular violence to women's aspirations and equality which figures in many of these representations. Again, however, we see some difficulties in completely absorbing into the *Criminal Code* the definitions proposed, particularly the Indianapolis by-law definition. We are concerned about having in the criminal law very broad terms that would cover a wide range of conduct. To criminalize images that present women as commodities would catch much of contemporary advertising, and we think that such an approach to the problems in advertising would be regarded as contrary to the *Charter of Rights* guarantee of freedom of expression: it is not a "reasonable" limit on the right. Similarly, a prohibition on presenting women as whores by nature might be regarded as so vague as to offend the freedom of expression guarantee.

However electrifying these concepts may be in popular or academic thought, it remains inescapable that a regime of criminal law requires more precision and restraint than is in the Indianapolis or Minneapolis by-law definitions. Thus, while we believe that the thinking about the new pornography should influence public policy, we have refrained from incorporating the particular formulations presented to us into our draft legislation. We have, as we discuss below, identified certain kinds of representations which we believe merit the criminal sanction, and have tried to describe these specifically rather than setting out a conceptual definition in the law. We have also recommended



changes to the hate literature section of the *Criminal Code* to recognize that pornography may be hate literature directed toward women.

## 5. Pornography and Erotica

Not all of those who seek changes in the criminal law advocate the use of the pornography terminology and approach as described. They comment within the framework of the existing law, with its emphasis on sexual morality, professing themselves content with the existing obscenity terminology. There is, however, much common ground occupied by those who have complaints about the present law, whether their orientation is toward the use of the pornography terminology or not.

One such area of agreement is to draw a distinction between pornography or obscenity on the one hand and “erotica” on the other. Erotica, as defined by Margaret Laurence, is the portrayal of sexual expression between two people who desire each other and who have entered this relationship with mutual agreement.<sup>29</sup> Gloria Steinem defines the erotic as a mutually pleasurable, sexual expression between people who have enough power to be there by positive choice.<sup>30</sup> Briefs submitted to the public hearings echoed these definitions of erotica.

In the recent decision of Mr. Justice Shannon of the Court of Queen’s Bench of Alberta in *R. v. Wagner*<sup>31</sup> the court declined to convict the accused under section 159(8) of the *Code* where the videotape in question was erotic. He accepted the definition of erotic presented to the court by Professor James Check, a definition very similar to those of Gloria Steinem and Margaret Laurence given above. In the judge’s words, the definition of “sexually explicit erotica” is material which “portrays positive and affectionate human sexual interaction, between consenting individuals participating on a basis of equality”.<sup>32</sup> There is no aggression, force, rape, torture, verbal abuse or portrayal of humans as animals. The court found that contemporary Canadian community standards would tolerate erotica, so defined, no matter how explicit it might be.

Another slightly different, but entirely compatible, view of erotica is that taken by the Williams Committee. According to them, the erotic is what expresses sexual excitement, rather than causes it. In this sense, the erotic work will suggest or bring to mind feelings of sexual attraction or excitement. Referring back to its earlier definition of pornography as that which intends to cause sexual excitement, the Committee adds that erotic material may cause feelings of sexual excitement and put the audience actually into that state, but if so, that is a further effect. It follows from the Committee’s definition, therefore, that what is represented in an erotic work of art need not be just a “milder version” of the pornographic. Indeed, many erotic works of art have no explicit sexual content of any kind,<sup>33</sup> and would thus not be regarded as pornographic at all.



We appreciate this separation of the erotic from the pornographic, and agree with it. We have not, therefore, considered it appropriate to adopt the working definition of pornography proposed by the Badgley Committee: "The depiction of licentiousness or lewdness: a portrayal of erotic behaviour designed to cause sexual excitement."<sup>34</sup>

Many briefs stressed the importance of devising a legal regime which would not criminalize erotica, in order to reach pornography. Some saw the absence of true erotica in the Canadian culture as one reason why young people turn for information about sexuality to magazines and films which teach them that sex is violent and brings pain. Other briefs pointed out that a real harm of pornography is (in the straightforward words of one presenter), that it tells lies about women. Erotica, on the other hand, does not lie about women, or about their sexual partners. Erotic literature or art created by women, it was argued, will do much to counteract the message that is propagated in pornography; it will provide a voice for the expression of what women really are. Not only women, but also men and young people of both sexes will benefit from this development.

We agree strongly that the criminal law should not stifle the development of erotic art. Nor do we want to fashion a criminal law regime that, in the name of protecting women, may serve to silence them. We do not, however, think that including a specific exemption for the "erotic" in the *Criminal Code* is the way to achieve these ends. Once again, while accepting the popular, or non-legal meaning of erotica, and the thinking behind its characterization, we have chosen to avoid the use of the specific term in our draft *Code* provisions. Instead, we have tried to be limited, and clear, about what we seek to expose to a criminal penalty, so that the "chilling effect" of our recommendations on genuine erotic expression will be minimized.

## 6. Conclusions

We have not tried to distil from the variety of popular meanings a pithy definition of pornography. In the discussions in this Report, we use the term pornography fairly generally and in the popular sense described in this chapter, because we are talking about what people complained to us about. When we come to our recommendations, however, we do choose specific terminology. Whereas we consider that it is natural and inevitable that different understandings of the term will proliferate in the public mind, we have decided to avoid for the most part use of "pornography" for legislative purposes. We are impressed with the variety of meanings attached to the term, and do not wish to import these into a system which we think should be characterized by clarity and certainty. We have similarly decided not to incorporate the term erotica into our recommended provisions. The only exception to this rule occurs in the titles of the sections we have drafted, for there we use the term pornography. It is, in that context, very carefully defined by specifying what sorts of acts are at issue.

For different reasons, we are recommending that the term obscene be retired from the criminal law and related federal legislation. It will simply not encompass the kind of material which is being described as the new pornography, and to rely on the opinion of the hypothetical viewer for its interpretation (the community standards test), introduces an element of subjectivity with which we feel uneasy.

Although we have avoided the formulation of our own brief working definition of pornography, we have been very aware of the two main sorts of pornography which preoccupy those concerned with this issue. Some would say that these are really one type, but in our effort to understand the phenomenon, we have left the apparent distinction as it stands, at least for purposes of analysis. One sort of material is the merely sexually explicit, characterized by both sexual content and an assumed or apparent intention to stimulate sexually the viewer. Missing from this sort of pornography is any appreciable amount of violence and degradation. Again showing the sexual content, but this time in combination with violence, degradation or abuse in such a way as to suggest approval of that abuse, is the second category of pornography. The theoretical underpinnings of our contemporary appreciation of this sort of material are laid by such thinkers as Jillian Riddington, Helen Longino, Andrea Dworkin and Catharine MacKinnon.

We believe that our recommendations must encompass both of these two large, and admittedly loosely defined, areas of pornography. Clearly, not all of it will merit criminal sanctions. Much may attract only regulation; other material will simply be left to individual taste and discretion. If we do not formulate our own precise working definition of pornography, though, there are those who will be wondering on what basis we will make these kinds of distinctions.

As we have mentioned above, our approach has been to try to define as precisely as possible the kinds of images and representations which deserve a criminal sanction, or regulation. We have done this by calling into play the principles enunciated at the beginning of this report. Of all the images and types of images there may be, we have tried to determine which sorts merit the criminal sanction because of the extent and degree of their harm to these principles, which ones may we more appropriately leave to regulation because the nature and extent of their impact may be more in the area of "offence" than of harm, and thus containable by means other than the criminal law; and which should simply be left alone. In coming to our own determinations on these points, we have been very conscious of our debt to those who have struggled with the question of the meaning of pornography, whether we agree with them or not. They have created an intellectual matrix for these discussions which, we venture to suggest, is richer and more challenging than that of a few years ago. We shall describe in some depth in Section IV the provisions which we propose for the criminal law and related statutes. Now let us turn to an examination of what we have been told and what we have learned about the reality of pornography in Canada today.



## Footnotes

- <sup>1</sup> *Customs Tariff Act*, R.S.C. 1970, c. C-41, as amended.
- <sup>2</sup> Revenue Canada, Customs and Excise, Memorandum R9-1-1, Ottawa, July 1, 1982, at Item 28.
- <sup>3</sup> *Broadcasting Act*, R.S.C. 1970, c.B-11, as amended by S.C. 1970, c.16 (1st Supp.), s. 42; c.10 (2nd Supp.), s. 65 (Item 2); S.C. 1974-75-76, c.49, s.18.
- <sup>4</sup> *Radio (A.M.) Broadcasting Regulations*, C.R.C. 1978, c. 379, s.5(1)(a) and (c) respectively; *Radio (F.M.) Broadcasting Regulations*, C.R.C. 1978, c.380, s. 6(1)(a) and (c) respectively.
- <sup>5</sup> *Television Broadcasting Regulations*, C.R.C. 1978, c. 381, s.6(1)(a) and (c) respectively.
- <sup>6</sup> *R. v. Beaver* (1905), 9 O.L.R. 418 (Ont. C.A.), per MacLaren, J.A. at 424.
- <sup>7</sup> *The Shorter Oxford English Dictionary on Historical Principles* (3d ed.) (Oxford, The Clarendon Press, 1973) Vol. II, at 1428. For a discussion of the evolution of this dictionary definition, see *Badgley Report* at 1079 and at 1086.
- <sup>8</sup> *Cassell's New Latin-English English-Latin Dictionary* (London, Cassell & Company Ltd., 1959), at 403.
- <sup>9</sup> 413 U.S. 15 (1973), at 24.
- <sup>10</sup> *Cassell's New Latin-English English-Latin Dictionary*.
- <sup>11</sup> Law Reform Commission of Canada, Working Paper 10, *Limits of the Criminal Law; Obscenity: A Test Case* (Minister of Supply and Services Canada, Ottawa, 1977), at 8.
- <sup>12</sup> See s.19 of Bill C-19, 1983.
- <sup>13</sup> This scene was contained in the film of "outtakes" from the Ontario Censor Board.
- <sup>14</sup> Williams Report, para. 8.4, at 104.
- <sup>15</sup> *Ibid.*
- <sup>16</sup> *Ibid.*, para. 8.6, at 105.
- <sup>17</sup> Williams Report.
- <sup>18</sup> *Jacobellis v. Ohio*, 378 U.S. 184 (1964), at 197.
- <sup>19</sup> *The Shorter Oxford English Dictionary on Historical Principles* (3rd), Vol. II, at 1631.
- <sup>20</sup> Williams Report at 103.
- <sup>21</sup> Williams Report at 96.
- <sup>22</sup> Williams Report at 103.
- <sup>23</sup> Helen E. Longino, "Pornography, Oppression, and Freedom: A Closer Look". Laura Lederer, (ed.), *Take Back the Night: Women on Pornography* (Toronto & New York, Bantam Books, 1980) at 29.
- <sup>24</sup> *Ibid.*, at 29-30.
- <sup>25</sup> Jillian Ridington, *Freedom from Harm or Freedom of Speech?* a discussion paper prepared for the National Association of Women and the Law, Ottawa, 1983. Among those recommending adoption of this definition are the Newfoundland Teacher's Association, the New Brunswick Advisory Council on the Status of Women, and Le Regroupement Féministe Contre la Pornographie, which has translated the definition into French, as follows:  

La pornographie est une représentation réelle ou simulée, en mots ou en images, filmée, sur bande vidéo, ou sous toute autre forme, de comportements sexuels, dans laquelle un-e ou plusieurs des participant-e-s sont ouvertement ou implicitement contraint-e-s à cette participation, ou sont blessé-e-s ou molesté-e-s physiquement ou psychologiquement: comportement dans lesquels un déséquilibre de pouvoir est évident ou implicite du fait de l'immaturité en âge de tout-e participant-e, ou du fait de certains aspects du contexte de la représentation; représentation dans laquelle ces comportements peuvent être interprétés comme étant encouragés ou endossés.



- <sup>26</sup> City-County General Ordinance No. 24, 1984 (June, 1984), Sec. 16-3(v).
- <sup>27</sup> An ordinance of the City of Minneapolis Amending Title 7, Chapter 139 of the Minneapolis Code of Ordinances relating to Civil Rights, 1983, Adding a new section (gg) to Section 139.20.
- <sup>28</sup> Memorandum to Minneapolis City Council from Catharine A. MacKinnon and Andrea Dworkin, Re Proposed Ordinance on Pornography, December 26, 1983, at 1.
- <sup>29</sup> Margaret Laurence, "On Censorship (A Speech Given to the Ontario Provincial Judges and Their Spouses), Peterborough, Ontario, June 2, 1983 (unpub. Ms.), at 9.
- <sup>30</sup> Gloria Steinem, "Erotica and Pornography: A Clear and Present Difference". Laura Lederer, (ed.), *Take Back the Night: Women on Pornography* (Toronto & New York, Bantam Books, 1980) at 23.
- <sup>31</sup> 16 Jan. 1985, unreported (Alta Q.B.).
- <sup>32</sup> *Ibid.*, at 19.
- <sup>33</sup> Williams Report at 104.
- <sup>34</sup> Badgley Report, Vol. II, at 1080.



## Chapter 5

# Views from the Public Hearings

### 1. Introduction

Any attempt to summarize in a few pages the views presented by hundreds of different organizations at public hearings in 22 different centres across Canada might seem to be an impossible task, doomed to failure, particularly when one considers the wide divergency in the views held by these organizations. Analysis of the briefs submitted at the hearings showed that there is a wide range of opinion among Canadians about what is offensive and what should be considered pornographic.

At the conservative end of the continuum are those who want the legal definition of pornography to include any depiction of sexual activity, whether it be inside or outside of marriage, or any depiction of persons in nude or suggestive poses. At the other end of the spectrum are those who found all pornography acceptable, except for explicit sexual portrayals of children. Between these two extremes, there was a wide range of opinion as to what is acceptable. The position of most feminist groups, and some church organizations, was that erotica, which they described as sexually explicit material which contains no violence or coercion and in which the participants were there by choice, was acceptable. They were totally opposed however, to violent pornography, which they defined as material with a sexual content combined with violence, degradation and abuse, with men shown as the aggressor and women as the subordinate or victim.

Indeed, despite the differences of opinion as to what should be considered pornographic, there was consensus in this area: the question of what should be done about violent pornography. A large majority of presenters expressed strong concerns about the prevalence of violent pornography and urged that government controls be strengthened to ensure that such material is kept off the newsstands and is prohibited on television.

The witnesses and groups favouring controls came from women's organizations, churches and church groups, with a smaller number of community organizations and educational associations, such as teachers' federations in several provinces. There were also a few men's organizations,



which had been set up specifically to oppose pornography, a sprinkling of elected representatives from every level of government, some municipal officials, and some representatives of police forces or police unions.

Opposed to control or censorship of pornography were: firstly, civil liberties groups, some professional associations and film and video organizations; secondly, the Periodical Distributors Association, the Video Retailers Association and a handful of retailers in a few cities; and thirdly, gay rights organizations in major cities.

In its analysis of the briefs from such a wide diversity of organizations, the Committee found that the majority of submissions had concentrated on similar aspects of pornography, although some focus more strongly on certain issues. Large numbers of briefs described the proliferation of pornography in their own communities and many reported on their efforts to control or prohibit its availability, either through the use of municipal by-laws, provincial censorship powers over movies, or local enforcement of *Criminal Code* provisions prohibiting obscene materials.

There was considerable discussion of a new definition of pornography and of the difference between pornography and erotica. Many briefs explored the issue of the link between pornography and violence and supported their positions with local anecdotal evidence, as well as reference to academic research studies, many of which were from the United States.

We received numerous recommendations, some in considerable detail, for changes to legislation at all three levels of government. At the federal level, major changes to the *Criminal Code* provisions on obscenity were proposed, as well as to the *Customs Act*, the *Broadcasting Act* and regulations of the Canadian Radio-Television and Telecommunications Commission. At the provincial level, there were strong suggestions that provincial censorship or classification boards, which now censor and classify movies for public showing, should also deal with home videotapes. At the local level, there was unanimous support for the introduction of municipal by-laws to control the display of pornographic magazines and videotapes so as to keep them out of sight of children.

## 2. The Prevalence of Pornography

Many groups, in preparing their briefs, had conducted local surveys to determine the type and availability of pornography in their own communities. The Manitoba Advisory Council on the Status of Women reported, for example, that a random survey of 17 local retail stores in Winnipeg revealed that only two of the stores did not sell pornographic material. In the others, the material ranged from two to well over 400 different examples of pornography. The London Status of Women Action Group reported that over 80 percent of local variety stores sell pornography, with many having as many as 100 different titles in stock. Community Against Pornography in St. John's was

particularly incensed over the use of government funds and community halls by male service clubs to show pornographic movies at club social functions.

Many expressed their concern at the increasing amount of violence, both in pornographic magazines and videotapes, as well as in movies shown in public theatres. The Canadian Federation of University Women, in Toronto, quoted a report from Mary Brown, director of the Ontario Film Review Board which estimated that in 1982 only one film in twenty contained sexual violence. By 1983, it was one film in nine.

The effect of pornography on women, children and on society as a whole was described in sensitive terms by some church as well as lay organizations:

In recent years, pornographic publications and movies have become more and more explicit as well as more readily available. Pornography victimizes and debases women by portraying them as mere objects, and degrades men by portraying a stereotype of aggression. Pornography increasingly uses children as subjects, and increasingly depicts and incites to violent behaviour.

*Anglican Diocese of Toronto*

Pornography does not recognize or celebrate the holistic reality of our humanity, the integration of body, mind and spirit. Pictures and descriptions reduce women to sexual parts, mindless bodies to be played with, poked or even mutilated ... Pornography fails to recognize the wide range of emotions made possible by human encounters ... Pleasure for men is portrayed through acts of inflicting pain or exercising power. Women, supposedly, find pleasure in experiencing pain ....

Pornography promotes racism ... (and) supports and promotes the belief that female sexuality is dirty or evil ... (It) perpetuates the terrible myth that sexual violence is deserved and needed by the normal female ....

*United Church of Canada, London*

... the nihilism of pornography can only be considered as anti-life, harmful to the dignity of people and to the development of sane and lasting personal relationships as the basis of healthy family life. Because it fails to accept sexuality as a unique gift for understanding and for creating new life in the image of another person, pornography is anti-sex.

*Canadian Conference of Catholic Bishops, Ottawa*

Of particular concern to municipal officials who participated in the public hearings was the difficulty encountered in trying to draft and enforce by-laws to control or prohibit pornography. Additionally, several cities, among them Ottawa, Toronto and Vancouver, complained that the present *Criminal Code* provisions on obscenity are so nebulous and so open to various interpretations, that they are extremely difficult to enforce.

We have ... a situation in Vancouver where 15 charges of obscenity were laid against an adult entertainment store in January of 1983. The case has been adjourned pending an appeal on yet another case in Victoria where a decision is expected shortly. However, if the Victoria decision finds for the prosecution, local Crown Counsel expect that that decision will be appealed all the way to the Supreme Court of Canada and they want a ruling at that level before proceeding with any other charges. Obviously, there is little point in laying new charges at this time, yet the Police Department has cabinets



full of books, magazines and videotapes which they deem to be obscene. The distributors of these materials are still in operation.

*Alderman May Brown, Vancouver*

The Committee received many different estimates regarding the size of the pornography industry in Canada and North America. The Canadian Coalition Against Media Pornography, Ottawa, estimated that in North America the income grossed by pornography "ranges from \$12 billion a year to \$50 billion a year, not including videos. In Canada, estimated earnings from pornography controlled by organized crime is \$500 million a year." David Scott, of Toronto, told the Committee that after discussions with law enforcement personnel he formed the view that these sales figures are significantly inflated by the money from other criminal activities being "laundered" through the pornography industry: profits from drugs, racketeering, and loan sharking. He estimated that conceivably two thirds of the income is laundered money.

In each city in which public hearings were held, the Committee was provided with samples of pornography and descriptions of the nature and availability of pornography in that community. In Montréal, Monica Matte observed that the line between soft and hard core material is disappearing. She presented an exhibit of pornography available from one downtown store. It featured incest of all kinds, explicit sexual representations of pregnant women, bondage, racial pornography, child pornography and child prostitution. Excerpts from some of the descriptions of pornography follow.

... [the] images present in the mass media have become ever more pornographic over the last decade. Society has increasingly allowed these images to become an acceptable and normal component of entertainment. The juxtaposition of "sex" and overtly aggressive behaviour, from beatings to rape, is commonly found on prime-time television. Each time a new frontier of violence and sexual exploitation is crossed by mass culture, traditional pornographic images become more violent and explicit.

... [in soft-core pornography] the images of women ... are exclusively vulnerable and available. Women are often referred to as "girls" or by even more denigrating terms, and they exist solely for the sexual gratification of male masters. Soft-core pornographic magazines such as *Playboy* and *Penthouse* depict women on their backs or in crawling positions, often with their buttocks or vaginas displayed for male approval. The positions signal total submission.

*B.C. Teachers Federation, Vancouver*

Examination of soft-core magazines shows that there is much more incest, pedophilia, and violence and humiliation of women than there was ten years ago. [We see as pornographic] material which is produced with the intention of or effect of sexually stimulating the consumer *by the portrayal of a power relationship* .... The mere fact that material has the effect of sexually stimulating the consumer does not make it pornographic.

*Toronto Area Caucus of Women and the Law, Toronto*

Pornography is yet another way to silence women. Most women ignore pornography; it is marketed by men for men. The instinctive reaction of many women to pornography is revulsion. The increasing violence, abuse and degradation of women in pornography reveals it to be not about sex or love,



but about power of men over women. A common thread running through it is that women are animals, slavishly devoted to carnally pleasing their masters, who are fully dressed, rational and in control of them and the situation.

*Young Women's Christian Association, Winnipeg*

[We] feel in danger of being swamped with a flood of pornography - magazines, movies and now videotapes, almost all made outside Canada. Our very culture is being undermined and our way of life threatened.

*Canadian Federation of University Women, Toronto*

### 3. The Effect of Pornography

The effect of pornography on women, children and society was described in considerable detail in many briefs. The concern of most participants was threefold: that pornography degrades women, robs them of their dignity as individual human beings and equal partners within a relationship and treats them as objects or possessions to be used by men; that male violence against women is treated as socially acceptable and viewers are desensitized to the suffering of others; and thirdly, that these two influences will have a strong negative influence on children and on the family.

All pornography degrades women. The spectrum of soft to hard core is often alluded to, with the implicit or explicit connection that hard core pornography is dangerous, while soft core pornography is not, or at least, not so dangerous. We dispute this. All pornography is dangerous to women, because it robs us of our dignity, the right to be treated with respect as complete beings, and it squanders our needs as men and women to engage with others as equals.

*Manitoba Advisory Council on the Status of Women, Winnipeg*

The dignity of women is undermined, dehumanized, and [they] are seen by men as objects, possessions to be used as they see fit, which contributes to the problem of battered women. Even the most mild form of pornography is harmful. The values which support family love, mutual respect, and generosity are undermined, and lust, exploitation, selfishness are promoted.

The growing presence of pornography harms society [because] it:

- 1) increases violence;
- 2) damages family relationships;
- 3) influences young people to engage in pre-marital sex;
- 4) children are harmed and exploited.

*Concerned Morality League, Winnipeg*

Nous considérons en effet que *toute pornographie*, qu'elle soit douce ou "dure" et même dans les cas où elle ne recourt pas explicitement à la violence *est violente* lorsqu'elle suggère que les femmes ont pour unique fonction d'exciter sexuellement les hommes, qu'elle les ravale à l'état d'objets destinés à être manipulés, exploités, dégradés, qu'elle les réduit à leurs seuls organes sexuels, qu'elle refuse aux femmes tout statut d'égalité et d'humaine autonomie. Cette perception de la femme est incompatible avec la dignité humaine. La pornographie alimente des attitudes et des comportements foncièrement sexistes, discriminatoires à l'égard des femmes alors même que notre société prétend promouvoir l'égalité des femmes. Il y a certes une grave incohérence à se préoccuper des problèmes du viol et des femmes battues

alors que l'on permet que des femmes soient agressées et violentées à l'écran, sur photos, dans les livres ou de toute autre façon.

*La Fédération des Femmes du Québec, Montréal*

Pornography is unacceptable not because it portrays explicit sex but because it promotes hatred, violence, degradation and dehumanization. Pornography is sexist material that portrays women as a distinct sub-human species that does not feel pain or humiliation in the same way as men, and which desire violence and degradation for sexual pleasure. Pornography advocates, encourages and condones coercion, sexual violence and battering and portrays these activities as normal behaviour. As an expression of sexist ideology, pornography promotes a climate in which acts of sexual hostility directed against women are not only tolerated but ideologically encouraged.

Women are ... terrorized by the message that male violence and power is so prevalent and menacing. Pornography alienates women and men. In no way does it foster healthy sexual or human relations any more than other forms of hate literature would foster healthy relations between races or religions.

*Ontario Advisory Council on the Status of Women, Toronto*

... exposure to pornography leads to an increase in violent sexual crimes and aggressive anti-social behaviour. The person exposed to pornography is being conditioned to think that not only is violence socially acceptable, but that it is sexually stimulating and that the person who is unwilling to be the recipient of the violent act will enjoy it if forced to submit ... Pornography suggests that a woman's value lies in her physical appearance and her ability to sexually satisfy a man. All other capabilities are trivialized ... Pornography undermines values that are important to our society because it dehumanizes the participants, desensitizes the viewers to the suffering of others, and distorts mutual, caring expression into a base act committed by a powerful figure upon a powerless object.

*Provincial Advisory Council on the Status of Women, St. John's*

Pornographic material ... makes us inclined to accept violence, to downgrade and even deny the dignity of other people, and to unleash our tendencies to dominate others ....

*Canadian Conference of Catholic Bishops*

Pornography negates sexuality as an expression of love and a form of intimate communication between equal human beings. It focuses merely on parts of the body ... (and) ignores mind and spirit, and turns human beings into objects.

*United Church of Canada, Toronto*

[Pornography] distorts wholesome and God-given sexual relationships (and) exploits them for profit, so that persons who, in God's purpose, are capable of and deserving of fulfilling personal relationships are deceived into accepting debased fantasies in place of love and commitment.

*Anglican Diocese of Toronto*

Pornography desensitizes people to each other and destroys the foundations of love, of family, and of human relationships.

*Salvation Army, Toronto*

One of the most interesting perspectives on the effect of pornography on children, its effect on young boys, was presented by one of the few men's organizations to appear at the public hearings, Le Groupe d'hommes contre la pornographie et l'exploitation sexuelle (Men Against Pornography), Québec City.



Il est malheureux de constater que la sexualité des hommes gravite beaucoup autour de la pornographie ... Tout cela n'est pas surprenant, car c'est souvent à partir de la pornographie que les hommes apprennent à donner forme à leurs désirs, y puisent leurs "techniques" et leurs croyances par rapport à leur sexualité. Cet apprentissage commence très tôt dans la vie. Pour la plupart des hommes de notre génération, c'est dès le début de l'adolescence que nous avons commencé à consommer de la pornographie. C'est surtout là que nous avons tiré nos critères de performance sexuelle, de virilité et ce que nous croyons savoir sur la sexualité féminine. Il en va de même de la génération des 15-20 ans: une enquête menée par un professeur de sexualité du CEGEP Lévis-Lauzon auprès d'étudiants de 19 ans a montré que 98.5% d'entre eux avaient déjà "consommé" de la pornographie, et ceci en moyenne dès l'âge de 13-14 ans. Un sommet semblait atteint vers 17 ans, pour diminuer ensuite. Mais l'apprentissage était fait. Dans un atelier que nous avons récemment animé, un des hommes présents a avoué qu'il avait commencé à regarder les revues pornographiques de son frère à l'âge de 8 ans. Même avant l'éveil de sa sexualité adulte, il avait déjà la tête pleine d'images pornographiques qui allaient orienter ses désirs dès leurs premières manifestations à son adolescence.

*Le Groupe d'hommes contre la pornographie et l'exploitation sexuelle, Québec City*

While most of the briefs focused on the social harms that are caused by pornography, one economist described the effects which pornography has on women's position in the economy.

... it is not pornography, existing independently, that threatens women's acceptance into and contribution to our economic infrastructure, but pornography as a particularly invidious form of sexism that has thus far defied our legislators in their attempts to protect women from sexual discrimination. Only an intrinsically sexist society could so wholeheartedly support (financially and legally) the sheer volume of pornographic materials available ... it is pornography, the most visible and virulent symptom/form of sexism that may continue to segregate women's abilities from the economic mainstream long after legislation protecting equal pay for work of equal value, or prohibiting sexual harassment, or even encouraging affirmative action is in place and is being practised ... [Pornography is] as much to blame for the slow integration of women into our economic framework as any other manifestation of sexist attitudes.

*Carl Beigie, economist, Toronto*

## 4. Definitions of Pornography

The nature of pornography and how it should be defined created a great deal of discussion during the public hearings. The discussion raised two important questions: first, the difference between pornography and erotica, and secondly, the question of where, in the continuum of sexist portrayals of women in the news media, the portrayal of women becomes actually pornographic. While many definitions were proposed, the three most often quoted definitions were those developed by Helen Longino, an American feminist and writer, by Jillian Ridington, a Vancouver researcher, and by Andrea Dworkin and Catharine MacKinnon, of Minneapolis. All of these definitions are discussed in the previous chapter.



Helen Longino's definition, which was quoted in many briefs, is as follows:

Pornography is verbal or pictorial material which represents or describes sexual behaviour that is degrading and abusive to one or more of the participants *in such a way as to endorse the degradation*. (Emphasis in original)

The distinction between pornography and erotica created differences of opinion between groups with a feminist perspective and those on the conservative end of the spectrum. According to many groups, the distinction is crucial.

[Erotica] represents images in which the participants are not degraded or abused and are presented as participating equally and freely. Erotica celebrates the positive, healthy experiences of mutual sexual enjoyment between adults.

*Manitoba Action Committee on the Status of Women, Winnipeg*

Erotica is for sexuality, since its message implies a mutually pleasurable expression between people; pornography is about commercialized sex, dominance, conquest, and violence against women. Erotica suggests a more balanced power relationship and respect for the body; pornography forces a distorting commercial relationship between the conqueror and victim, and hence is degrading to both male and female.

*Deborah Seed, Montréal*

The conservative position on erotica was that it should be included in the definition of pornography and prohibited or controlled.

... consensual sex, as portrayed in the media, can be destructive of Canadian societal values ... Depictions of explicit, consensual sex would lead to an expectation that any woman will consent, leading further to coercion in real man-woman relationships. Even depictions of loving, indeed marital, sexual intimacy in full, explicit detail ... ultimately dehumanizes sexuality itself ....

*Roman Catholic Archdiocese of Toronto, Toronto*

... there is a direct relationship between habitual exposure to standard sexual material referred to as "erotica" and an increased desire for more bizarre material .... If the people in the representation ... seem to be "consenting adults" rather than people involved in "degrading" or "demeaning" activity, the material could still be pornographic .... Pornography should be defined so as to include ... explicit sexual acts.

*REAL Women of Canada, Toronto*

## 4.1 Pornography as Part of a Continuum

The view that pornography was only the extreme end of a continuum of sexist portrayals of women was held by many of the organizations which presented briefs to the Committee. As one participant put it, "pornography is the heartbeat of a sexist society." It reflects and reinforces the sex-role stereotyping and existing inequalities of the larger society, reflecting the power relationships of males and females, as well as those in adult-child relationships and inter-racial relationships.

Media Watch considers that sex role stereotyping of women creates an environment that encourages the dehumanization, misrepresentation and

degradation of women. The extreme form of this attitude is pornography. Presently our environment is polluted with messages that tell us women are powerless, feeble-minded, submissive, victims, and only valuable if they are young, beautiful and white ....

Male dominance and female submissiveness are at the very heart of the stereotype of men and women. Pornography is the extreme portrayal of dominance-submissiveness, the objectification and the abuse of women. Media Watch views sex role stereotyping and pornography as a continuum which must be uprooted from our culture.

*Media Watch, Calgary*

Pornography has an important function in society's oppression of women. It is the propaganda, the prop, supplying men with examples of society's model of masculinity. Pornography helps to ensure women's sexual, social, political and economic repression. It cannot be a coincidence that pornography exists in a society where women are raped, beaten by husbands, pushed into low income work and generally not taken seriously.

It is a painful act of self-recognition of Christians, especially male Christians, that the Church has transmitted and shaped male domination in western culture. It is beyond doubt that the Church is part of the problem. But with God's grace, we may find courage to become part of the solution.

*United Church of Canada, Toronto*

## 5. The Link Between Pornography and Violence

One of the most controversial aspects of the public hearings was the conflict that arose over the link between pornography and violence against women. Those advocating the strengthening of government controls over pornography were convinced that psychological and sociological research had definitely established that such a link existed. Civil liberties groups and others who opposed controls were just as firmly convinced that no such link had been established. The Committee's conclusions on this issue are discussed elsewhere in the Report. This section will simply provide a sample of the views presented at the public hearings, with no comment as to their validity.

The Metro Toronto Task Force on Public Violence Against Women and Children provided a brief summary of the highlights of the research that has been done on pornography and violence.

1. Research in communications and psychology shows that the portrayal of violence in the media contributes to subsequent anti-social behaviour by its viewers. Scientists no longer question this effect; rather they now investigate to what degree anti-social behaviour is elicited, from whom, and under what conditions.
2. Research in experimental settings shows that the portrayal of sexual violence leads to subsequent violence against women. Under certain conditions of arousal, viewing sexual violence causes male subjects to be even more violent toward women than when they view non-sexual violence.
3. Research evidence is growing that so-called 'non-violent' or 'soft' pornography also causes males to behave aggressively toward women, although less intensely than the portrayal of violence alone or the portrayal of sexual violence.



4. While social science shows unequivocally that exposure to violent pornography is a *contributor* to sexual aggression and violence, the rules of scientific evidence make it difficult, if not impossible, to prove that it is the direct *cause* of such behaviour.

However, as prominent scientists have noted, neither has the Surgeon General (in the United States) unequivocally proven that cigarette smoking is a direct cause of cancer in human beings. Both, however, have accumulated compelling evidence of causal links.

These findings, and many related findings described in the literature, indicate ample justification for our society to quickly take steps toward the elimination of violent and aggressive pornography.

*Metro Toronto Task Force on Public Violence Against Women and Children, Toronto*

Many groups provided the Committee with anecdotal evidence of the connection between pornography and violence in their own communities. The Ontario Advisory Council on the Status of Women included a compendium of anecdotal and circumstantial evidence linking pornography to actual crimes committed in North America. Le Regroupement Féministe Contre la Pornographie, in Montréal, described their work with battered women and reported that they are increasingly encountering women who have been forced to re-enact scenes from pornography consumed by their partners. The Canadian Federation of University Women in Toronto cited several Canadian murder cases in which there was said to be a connection between the murderer's actions and his use of pornography. A social worker, a member of La Fédération des Femmes du Québec, conseil Régional Saguenay, told the Committee that she frequently meets situations where women are required by their spouses to engage in unusual practices, to join in group sex and exchange partners, to engage in the sexual practices their spouses have seen on pornographic films in local bars, and to pose nude.

The Toronto Area Caucus of Women and the Law, like many other groups, cited studies by Professors Malamuth and Donnerstein to support their view that pornography encourages male violence against women by linking men's sexual arousal to violence and conditioning them to perceive violence as an essential component of sexual excitement; by showing violence against women as acceptable; by depicting women as enjoying violence against themselves.

Many took the view that while research linking pornography and violence is in its beginning stages, they personally do not want to wait for confirming evidence of the negative long-term effects of violent pornography. They believe that the probability of a strong link between violent pornographic videos and an increase in sexual offences must be taken seriously until proven false by statistical evidence.

They point out that pornography, like advertising, is a message with the aim of influencing behaviour. Since studies have already established that sexist advertising reinforces sexual stereotypes, pornography must have some influence on male behaviour.



I compare pornography to racist films or literature: the medium does not cause misogyny in the case of pornography, nor racism in the case of racist material, but can serve to confirm these values, lend them legitimacy and encourage behaviour based on those values. From this confirmation, this legitimization, stems the harm.

*Mayor Marion Dewar, Ottawa*

Current scientific study (Malamuth and Check) has proven that in the laboratory setting there is no question that the sexual violence depicted in aggressive, violent pornography leads to aggression toward women. Specifically, there is considerable evidence showing that exposure to aggressive pornography dealing with rape produces a lessened sensitivity to rape, an increased acceptance of rape myths and *interpersonal* violence against women, as well as self-reported possibility of raping.

*Canadian Coalition Against Media Pornography, Ottawa*

## 6. Municipal By-Laws and the Display of Pornography

Many groups described their efforts to persuade their municipalities to introduce or enforce by-laws to control the access of children to pornography. Major difficulties arose because of the vagueness of the federal legislation regarding obscenity and the enabling provincial legislation in some provinces, as well as the reluctance of local governments to act.

The recommendations made by most groups, including civil liberties associations, was that the display and sale of sexually explicit materials should be restricted to adults. Some suggested that all such magazines should be displayed behind opaque barriers at a height of 1.5 meters above the floor and that such publications should be sold in sealed plastic packages.

## 7. Film Classification and Censorship

Most groups favoured the continued provincial classification or censorship of all movies to be shown in public, although there was some criticism of particular provincial boards. There was also strong support for the proposal that provincial censor boards expand their duties to include the censorship of videotapes destined for private viewing.

[This group] favours the establishment of a classification and labelling process of all video recordings, including a process of pre-screening by a permanent board and forfeiture of all material deemed illegal ....

*People and Organizations in North Toronto, Toronto*

[We] recommend that censor boards be given more adequate staff to cover the enormous volume of material being imported; have their mandates expanded to cover video cassettes, be they shown in public, rented or sold for private use; and similarly, be made responsible for the review of all television transmissions.

*Roman Catholic Archdiocese of Toronto, Toronto*

[NAC] cautiously advocates limited and clearly defined censorship and recognizes the need and difference between prior and post restraint measures.

The attendant problems of the former can best be avoided by issuing clear and explicit guidelines and by the selection of Censor Board members who have a comprehensive awareness of the problems of violence against women ... Prior restraint [should] be used to eliminate only the most blatantly pornographic material and ... post restraint or the use of the Criminal Code provisions [should] be used to deal with material that either escapes the prior restraint process or which clearly exceeds the guidelines.

*National Action Committee on the Status of Women, Toronto*

The Manitoba government is now examining a host of reforms, including classification of videos for home use and regulating the use of satellite pornography in hotels and beverage rooms. However, without the suggested federal reforms, these initiatives cannot go ahead.

*Manitoba Action Committee on the Status of Women, Winnipeg*

## 8. Canada Customs

The inability of Canada Customs to prevent the importation of a great deal of the most violent pornography into Canada was strongly criticized in many briefs. Excerpts from the Ontario Advisory Council on the Status of Women brief summarized the major concerns.

- 1) Customs officials follow the same procedures as other law enforcement officials in focusing on sexual explicitness rather than violence or degradation. As a result, the more harmful types of pornography are allowed over the border.
- 2) Customs practices are not the same across Canada. The Joint Forces Project "P" in Toronto has found that British Columbia and Québec allow materials to cross their borders which would be prohibited in other provinces. The Attorneys General in the provinces set their own obscenity guidelines and standards and Customs officials tend to follow those guidelines. Once over the border the material can be freely transported across Canada.
- 3) The heavy volume of traffic at border crossings creates a situation in which only a comparatively small number of vehicles can be searched.
- 6) The federal guidelines for determining what is immoral or indecent are vague and decisions made by Customs officials are often subjective.
- 8) Legitimate movie houses are given 60 days to decide whether they can afford to make the cuts necessary to allow importation. During the 60 days that the film is in Canada thousands of copies can easily be made. The movie house may then take the *original* film back to Customs stating that it could not afford to make the cuts. The original film is then banned by Customs, but copies are not covered and would have to be found and seized.

The recommendations made by most groups focused on the need to: strengthen and standardize the Customs procedures; to train Customs officers and provide them with guidelines; and to eliminate the 60-day period apparently allowed in some Customs areas to importers of commercial films so that they can have the film reviewed and classified by provincial authorities.



## 9. Recommendations for Change

In summing up their recommendations for change, many witnesses emphasized that it was not only the actual laws that need to be changed, but the administration of the laws. Many believed that the proliferation of pornography is not unrelated to the fact that our society, including its entire justice system, is controlled by men.

As it stands now, men make virtually every decision about what is and what is not obscene: at the source, in the conceptualization of sex roles by male producers of pornography; at the newsstand, the bookstore and box office, in the acceptance or rejection of pornographic materials for sale or purchase by predominantly male retailers and customers. Obscenity laws are written, argued and passed by legislatures comprised almost entirely of men ... The same laws are enforced at the borders by Customs inspectors who are almost invariably male, and in the community by police departments staffed overwhelmingly with men. Breaches of obscenity laws are prosecuted by male lawyers in courts presided over by a male judiciary. So called "expert" testimony is supplied, almost without exception, by male witnesses ....

Furthermore, day-to-day coverage of the obscenity issue is directed by male publishers, editors, editorial writers and reporters, with the inevitable result that male sensibilities predominate, usually to the virtual exclusion of any comment at all by women.

*Judith Dobie, Montréal*

The specific recommendations for change made by the majority of women's groups are similar in intent to those proposed by the National Action Committee on the Status of Women whose proposals are outlined below.

- 1) The present provision regarding 'obscenity' (Section 159, of the *Criminal Code*) should be repealed.
- 2) (a) A new offence, prohibiting the manufacture and distribution of pornographic material should be incorporated into the *Criminal Code*. This provision should not be located in the "Offences Tending to Corrupt Morals" section of the *Code*, but should either be in a new, independent section or be included in the section dealing with "Offences Against the Person" or under "Hate Propaganda".

Pornography should be defined as:

any printed, visual, audio, or otherwise represented presentation, or part thereof, which seeks to sexually stimulate the viewer or consumer by the depiction of violence, including, but not limited to, the depiction of submission, coercion, lack of consent, or debasement of any human being.

For the purpose of this definition, the depiction of any person who is under the age of 16 or who is depicted as being under the age of 16 will be sufficient to deem the material pornographic.

- (b) Wherever appropriate, the words "obscene" and "obscenity" should be deleted and replaced by the words "pornographic" and "pornography".



- 3) The *Customs Act* should be amended by removing the current prohibition against "material of an indecent or immoral nature" and replacing it with a prohibition against pornography, as defined in 2(a) above.
- 4) The *Broadcasting Act* should be amended to prohibit the broadcast of sexually abusive material, and such restrictions should apply to pay television.
- 5) The "Hate Propaganda" section of the *Criminal Code* should be amended to include sex as an "identifiable group". This section should be further amended by removing the necessity of the consent of the Attorney General before proceeding with an offence. [Some groups also suggested that the word "wilfully" should be deleted from Section 281.2(2)].

Suggestions made by other groups included:

- 1) The Solicitor General should instruct the RCMP and crown attorneys to keep records of the use of pornography in sex-related crimes, such as sexual assault, wife battering, incest and sexual murder.
- 2) Women should be given the civil right to sue producers of pornography for damages, as proposed in the Minneapolis by-law in the United States.
- 3) The guidelines on sex-role stereotyping, which were prepared for the Canadian Radio-Television and Telecommunications Commission, should be given the status of regulations and that licences for radio, television and pay television should be contingent upon adherence to these guidelines.

## 10. Organizations Opposed to Controls on Pornography

The opposition to controls, or to increased controls, on pornography, was made up of three distinct groups: first, civil liberties groups, some professional associations, and film and video organizations; second, periodical and video distributors and retailers; and third, gay rights organizations. Because their reasons for opposing controls were so different, each group will be treated separately.

### 10.1 Civil Liberties and Professional Associations

The right to freedom of expression and opposition to censorship were raised in briefs from the Canadian Association of University Teachers, from civil liberties associations and from film and video organizations.

A great deal of literature from the ancient Greeks onward has as themes violence, horror and degradation. One only has to think of *Oedipus Rex* or of

Titus Andronicus or indeed of many of Shakespeare's contemporaries ... or of any novelists or dramatists who have used war as a basic theme. Not only would the definition (as proposed in Bill C-21) place these works in jeopardy, it would also have a chilling effect on booksellers and publishers in Canada who may ... refuse to print, to sell or to distribute such books in order to avoid harassment.

*Canadian Association of University Teachers, Ottawa*

The Canadian Civil Liberties Association pointed out in its brief that while it "has no hesitation in joining the National Action Committee on the Status of Women in an unequivocal denunciation of the 'new pornography'" it found it necessary to distinguish between moral condemnation and legal prohibition.

The former is easy; the latter is fraught with difficulty ... How is the law to formulate a standard which will prohibit this vile pornography without simultaneously catching in the same net a lot of other material which it would be unconscionable to suppress?

*Canadian Civil Liberties Association, Ottawa*

The Civil Liberties Association points out that in several obscenity cases tried under present provisions of the *Criminal Code*, neither trial judges, appeal court judges nor Supreme Court judges were able to agree on whether books such as *Lady Chatterly's Lover* and *Fanny Hill* were obscene. The vagueness and subjectivity of the present law, the Association said, leaves publishers, film makers, authors and booksellers in a state of constant insecurity as to whether they are in compliance with obscenity laws. They conclude that while "one flawed definition does not invalidate the concept of legal prohibition ... there is reason to fear that dangerous imprecision is inherent in the very exercise of attempting to define pornography."

The Association concedes that the definition of pornography proposed by the National Action Committee on the Status of Women "creates fewer dangers than the one proposed by the government [because] it attempts to narrow the subject matter to the issue of coercive sex." However they conclude, after examining the danger posed by pornography, that:

... the evidence fails to demonstrate a direct causal link between exposure to pornography and the serious abuse of women and children. We are aware, of course, of the reports that on a number of occasions, those who have violated women and children were found with pornography in their possession. What is not known, however, is whether the pornography produced the violence or whether those violence-prone people were attracted to pornography. Moreover, there has been no adequate measure of the number of people, otherwise violence-prone, whose aggressive impulses may have been moderated by sublimation through pornography.

The Civil Liberties Association concludes that:

... the present obscenity sections of the Criminal Code should be repealed. Moreover, it is crucial that they not be replaced by anything broader. The ... recommendations of NAC ... represent welcome steps in the right direction. But ... even they are likely to incur excessive risks.

The Association is firm in its opposition to censorship of any material involving *simulated* sexual abuse, but concedes that in the case of pornography which involves the actual abuse of real people "there is an arguable case for legal prohibition against the resulting film or literature."

Civil liberties associations in several cities gave their qualified support to municipal regulations designed to keep pornography out of the sight and reach of children.

The B.C. Civil Liberties Association explained the rationale behind their acceptance of regulation.

Regulating a forum is not inconsistent with the maintenance of its freedom. We have an obvious and legitimate interest in protecting the young from forms of expression that we regard as possibly harmful to them. We also have an interest in protecting citizens from effrontery when we can provide that protection without materially limiting access to media on the part of persons who wish to see or hear them. Our association approves of those regulations which impose formal constraints upon those who distribute and sell pornographic materials to do so with that measure of discretion which provides for these two legitimate social interests. It is appropriate, for instance, for the Director of Film Classification to provide movie patrons with advice concerning the presence of possibly disturbing material. Similarly, we do not object to requiring magazine merchants to withhold from public view those of their wares of which the covers could disturb children or affront innocent adults.

*B.C. Civil Liberties Association, Vancouver*

The Canadian Association also agrees that pay TV stations should comply with certain standards regarding the material they are to carry.

Where facilities are at a premium, there is a strong argument for some kind of regulations over the mix of things which can be shown, whether it is sexual, religious, nationalistic, or athletic. ... the articulation of the standards is a contentious exercise ... [but it] is not as contentious in the context of granting special licences as it is in the context of restricting general freedoms.

Another organization which expressed strong opposition to censorship of any kind was the Ontario Film and Video Appreciation Society (OFAVAS) which has been involved for two years in court actions against the Ontario Board of Censors (now the Ontario Film Review Board). Their allegation that the Board contravenes the *Charter of Rights and Freedoms* was upheld by the Ontario Court of Appeal with the result that the Ontario government was forced to bring in specific legislation setting out the powers of the Censor Board.

OFAVAS, a group of filmmakers, writers, journalists, artists, performers and others, outlined their reasons for opposing censorship.

As people involved for the most part in creative fields, we use words and images as the tools of our work. Our creative use of these tools permits us to develop insight for ourselves and others into the nature of the world around us. We fear that if we cannot broach certain subjects or use particular images or words or ideas, that our effectiveness in giving expression to the complex range of human experience will be severely curtailed. We find it short-sighted



and untenable that a government-appointed board is permitted to interpret the meaning of images and ideas on behalf of everyone else in this society. It is gross interference in our work, and something that we feel is intolerable in a democratic society.

*Ontario Film and Video Appreciation Society, Toronto*

The Society also pointed out that as a group which supports feminist goals, they believe that social change is essential in order to improve the lot of women. However, they believe that censorship of pornography is an ineffective solution to the problems of discrimination against women.

We are aware of the negative image of women that pornography presents. We share the revulsion of many over commercial exploitation of people in pornographic material. However, we do not believe that pornography is the root cause of sexism in society: to the best of anyone's knowledge, a subordinate station in life has been the lot of women in most societies throughout history. We see censorship as a placebo measure that does nothing about the real problems that discrimination causes, and which, in fact, distracts from giving those problems the attention they deserve and require. Furthermore, the very real danger exists that censorship, perhaps even inadvertently, will serve to silence the very voices that could raise awareness toward social change.

*Ontario Film and Video Appreciation Society*

The Society then goes on to explain why it disagrees with the feminist view regarding violent pornography.

The feminist perspective that has gained wide acceptance and momentum has shifted emphasis away from graphic sexuality to questions of violence and power. This approach, however, implicates a whole range of imagery, from news, sportscasts and documentaries to narrative films like Westerns and horror movies. From our standpoint, it makes more sense to challenge overtly sexist behaviour and the discrimination and hatred behind that behaviour. But if we look for images that show women in a way that could be seen as sexist, it becomes very difficult to define the pornographic. Everything from fashion magazines to the paintings of the old masters could conceivably be seen to be in this category. Our fear, of course, is that if it is so difficult to define pornography, it is inevitable that attempts to define it in law for the purpose of censoring it will affect other areas such as social comment and artistic expression.

OFAVAS agrees that sexism and violence cannot be tolerated, and explains why censorship is not the answer.

But simply curtailing representations of these acts will not stop them from happening. It may even prevent people from discussing and understanding them. Censorship, by simply eliminating "objectionable" images, undermines public challenge and debate over the values which motivated their production. It attacks the symptoms, not the root cause. It is sex discrimination and hatred in the real world that hurts people and that must be stopped.

The solutions recommended by the Society include: a classification system which could be used to inform the public of the nature of material that might be harmful to minors or offensive to some adults; height and placement restrictions for magazines displayed in stores; and adult-only bookstores, if necessary.

It also makes recommendations designed to correct the present sexual inequality in the broadcast and film industry.

We urge the Committee to recommend and support all affirmative action programs with respect to the training and hiring of women in both the broadcast and film industries. We recommend that the Committee stress to these industries the basic inequality present in a system of production which is dominated by a single gender of our population.

We support the recommendations of the *Report of the Task Force on Sex-Role Stereotyping in the Broadcast Media*, ("Images of Women," CRTC, 1982), which calls for specific programming and media created and administered by women.

*Ontario Film and Video Appreciation Society, Toronto*

## 10.2 Periodical and Video Distributors and Retailers

The views of distributors and retailers of periodicals and videotapes were presented to the Committee by the Periodical Distributors of Canada, Ottawa, and the Video Retailers Association of Canada Inc., Toronto, as well as a few individual retailers.

The Periodical Distributors, founded in 1942, said that it represented 37 Canadian-owned or controlled companies which distribute approximately 85 per cent of the magazines and paper back books sold in 12,000 local newsstands throughout Canada. They estimated that their sales are approximately \$200 million annually.

In their brief, the distributors outlined their views on what Canadians would consider pornographic and denied any involvement in distributing such material.

... most Canadians would describe as pornographic, such hard-core material as that depicting, in an objectionable and most offensive manner, extremes of sexual behaviour, especially within the context of violence and forced submission of women.

While PDC members cannot assume responsibility for everything which may be offered for sale at retail outlets, we can assure the Special Committee that we do not knowingly handle material which is obscene or, by any reasonable standard, pornographic. PDC members have exercised particular concern over the possible presence in the mass market of material which may be exploitative of sex and violence in combination. We believe that "violent pornography" is extremely rare on Canadian newsstands, and that what may exist, is not there as a result of having been distributed by PDC members.

*Periodical Distributors of Canada, Ottawa*

The Video Retailers Association pointed out that the great majority of their retailers are business people anxious to maintain their reputation within their community. They agreed that the undue exploitation of violence, cruelty and sex should not be acceptable, but that their problem is in trying to define what is "undue." They stated that no one, not the police, the retailers' lawyers, the provincial boards of film censors or Canada Customs will provide guidance on what they can legally distribute.



They urged that standards should be established that would: be tolerable to the public; be clear and helpful to business and to law enforcement; be acceptable to private consumers; and be constitutionally workable.

### 10.3 Gay Rights Organizations

Several gay rights organizations presented briefs which emphasized that gay pornography is quite different from heterosexual pornography.

Heterosexual pornography is often said to victimize women as a gender group, women depicted as submissive and passive receptacles of violence by male producers for male consumers. The same cannot be said of homosexual male pornography, however, in which gay male producers, models, and consumers all come from the same gender group and cultural community.

The heterosexual male consumer, by virtue of his gender and place within patriarchal power relations, is automatically constrained to look at a woman in a sexual representation in terms of "otherness" and imposed objectification. In contrast, the homosexual male consumer, looking at gay sexual depictions, is offered a range of identification choices determined not by his gender but by his individual cultural and erotic predispositions. The argument that women as a group are victimized by heterosexual pornography has no equivalent argument with relation to gay pornography: in this sense, gay pornography is primarily a "victimless cultural phenomenon."

*Emergency Committee of Gay Cultural Workers Against Obscenity Laws, Montréal*

The Gay Cultural Workers provided an analysis of the difficulties faced by gays as a minority group in a predominantly heterosexual society.

Culture is the texture of people's lives, the way a community communicates with itself and the outside world. The state should encourage and protect community cultures not suppress them. State suppression cannot erase a culture, only change its form, drive it underground or distort its language.

As a minority characterized by its sexual orientation and sexual practices, the gay community has always had a flourishing tradition of erotic culture. Whether or not this has been underground or above-ground, written or oral, professional, ... or amateur, has depended on historical factors such as the tolerance of the state, the vigour of police persecution, and the degree of organization or concentration of the gay community.

All gay culture, not only gay erotica, is stigmatized by the heterosexist mainstream as pornography and obscenity. Obscenity statutes have traditionally been an important means by which the state, the Church, and the police attempt to destroy our culture, in the Canadian context as in many others. Since the so-called decriminalization of sodomy by the 1969 Omnibus Bill, and since the emergence of above-ground gay communities in every Canadian city about the same time, this campaign against gay culture by means of obscenity statutes has not disappeared. On the contrary, it has ballooned, ....

For centuries gay culture remained invisible, covert or underground ....

Since the mid sixties our culture has emerged above ground. There exists across Canada a flourishing fabric of gay culture, all including an important erotic component: literature, bookstores, cinema, visual and performing arts, journalism and media ....



Over the last fifteen years, the mass-produced erotic magazines have not been the only targets of the police (through enforcement of obscenity statutes, and through extra-legal harassment and prior censorship, Customs officials exercising censorship through highly subjective and undefined criteria), and other censorship bodies both official and unofficial. In fact, the more frequent targets of such attacks have been "legitimate" cultural manifestations, within all the categories listed above. The obscenity statutes permit not only the prosecution of our cultural products, including non-erotic print journalism, but create an atmosphere in which the equally dangerous unofficial and regulatory (non-criminal) censorship is encouraged, whether by provincial theatre boards, marauding morality squads, biased Customs officials, crusading private citizens, or puritanical television networks.

*Emergency Committee of Gay Cultural Workers Against Obscenity Laws, Montréal*

The major difficulty with the present obscenity sections of the *Criminal Code*, as far as the gay community is concerned, is the fact that the decision as to what is obscene is made by a judge, based upon "national community standards", and on the assumption that the judge knows what these standards are.

There are four problems with this:

- 1) Canada is made up of many diverse ethnic and cultural groups. A set national community does not exist.
- 2) Judges in Canada are appointed. They are not elected from a community to represent that community.
- 3) Though a gay community definitely exists, it is not limited to one geographic area. It is dispersed throughout a large country in which many community standards exist.
- 4) No judges are known to be openly gay.

To have a judge rule over what is degrading and horrifying to a community of which he or she probably has very little understanding and insight is to leave that community very vulnerable .... The existing obscenity laws, ... have been used against the gay community. The proposed changes to the law [Bill C-19 of 1983] make it all the more dysfunctional and thus a much more powerful tool for abuse.

*Emergency Committee of Gay Cultural Workers Against Obscenity Laws, Montréal*

The Gay Cultural Workers point out that if community standards are to continue to be the final test of what is obscene, the gay community should be allowed to define the standards for its own community.

It must be remembered that commercial explicit depiction of homosexual practices are aimed at gays. For the most part, prurient heterosexuals will only see these materials if they make a conscious effort to seek them. For the majority, no matter how large, to decide what materials a minority sees and hears, especially when that material has not been proven to be harmful in any way to the majority, goes against the democratic tradition.

*Emergency Committee of Gay Cultural Workers Against Obscenity Laws, Montréal*

The Committee was also urged to explore the idea of extending the hate literature sections of the *Criminal Code* to protect sexual minorities as well as visible minorities and women.

Many elements within the gay community would welcome legal redress against the frequently vicious homophobic components of mainstream culture and the media (for example the film *Cruising* which many of us felt to be advocating violence against us in an explicit and degrading way) or against more obvious forms of hate literature such as the anti-gay pamphlet campaign that affected the 1980 Toronto municipal elections through lies and smears.

*Emergency Committee of Gay Cultural Workers Against Obscenity Laws, Montréal*

Most gay groups called for the repeal of present obscenity legislation, some arguing against censorship of any kind, and others suggesting that a new section of the *Criminal Code* should be developed to deal specifically with pornography on the basis of sexual violence and not on the basis of sexual explicitness.

## 11. Conclusion

The public hearings were an important aspect of the work of the Special Committee. The well-researched briefs, presented by groups and individuals in every region of Canada and representing a wide diversity of opinion, were an invaluable contribution to the body of information collected by the Committee. We thank all of the participants who devoted many hours of their time for their help in the attempt to find acceptable solutions to the problems involved in pornography in Canada.





## Chapter 6

# Pornography in Canada Today

### 1. Introduction

As will be apparent from the preceding chapter, virtually everyone who appeared before the Committee or made a representation to it, had very strong views about pornography. While the majority of those making presentations found pornography to be too widely available, especially with respect to children, and the content of pornography to be abhorrent and despicable, there was a strong minority opinion stating that as awful as some of the pornography is, any moves by the state to ban or control access to the material would have worse consequences than the material itself being easily available.

The issues which were raised at the public hearings can be divided into three general areas: the increased availability of pornographic material; following from this, the implied increase in the number of people who are exposed, willingly or unwillingly, to such material; and thirdly, the harms to individuals and society as a consequence of the first two factors.

Those making representations to the Committee used a variety of sources of information to substantiate their arguments. Some groups had conducted their own surveys in their communities to see what sorts of materials were available and where; others reported on crimes or unacceptable forms of behaviour which appeared to be connected to the use of pornography. In addition, many people made reference to studies conducted by academic researchers which, they argued, supported the views and conclusions they had reached.

In this chapter we will analyze in some detail the evidence bearing on the three issues described above. The question of evidence is an important one. Canadians who wish to see more stringent controls on pornographic material, support this course of action because of the harms they see deriving from the widespread availability of pornography. Groups who are, in general, philosophically opposed to control and censorship, also indicated that controls would be acceptable to them if indeed significant harms were shown to result from use of such materials. Support for certain lines of action are, therefore, contingent on the strength of the arguments about increased availability, increased use and resulting harms.

In order to assist the Committee in its efforts to understand the current situation with respect to the availability and use of pornography in Canada today, the Department of Justice commissioned a number of studies on pornography. The studies fall into four general categories: 1) comparative studies, 2) specific issues within Canada, 3) a National Population Study, and 4) a review of the recent research.

The comparative studies involved an analysis of legislation and control practices in the United States, the United Kingdom, selected European and Commonwealth countries and other jurisdictions thought to be of interest.<sup>1</sup> The research was generally undertaken in conjunction with work on prostitution laws. Information was taken from published sources, interviews with selected officials, if possible, and reports on public attitudes towards the issues.

Within Canada, four empirical studies were commissioned on specific issues: provincial film censor boards,<sup>2</sup> the production of pornography in Canada,<sup>3</sup> a content analysis of triple x and adult videos<sup>4</sup> and an analysis of how selected newspapers covered pornography as an issue.<sup>5</sup>

In addition to these studies, a major element in the research was a National Population Study conducted in June and July, 1984.<sup>6</sup> A sample of 2,018 Canadians, representative of all parts of the country except the Yukon and Northwest Territories, answered questions about the availability of pornography in their communities, their use of such material and their preferences about whether or how the material should be controlled. Although it is difficult to study such complex issues as obscenity and its control in the relatively short time given to survey interviews, the results present some interesting information on Canadian views. As the first such large-scale project in Canada, however, the survey was something of a learning experience for all concerned. Because of this, not all the issues included in the survey were as well addressed as one would wish. The results should, therefore, be seen as one contribution to an understanding of these issues, and not a definitive statement on the topic.

The final project in the Department of Justice's research program was a review of the research literature from 1975 onwards.<sup>7</sup> The review examines the impact of pornography as presented by researchers in sociology, psychology, social psychology, criminology or related fields. Over 450 citations were examined and reported on. This review is very comprehensive and proved invaluable in assisting the Committee to gain an overview of all of the more current research in the area.

Although the Department of Justice's research has provided the Committee with most of its empirical information on pornography, the Committee itself was involved in the gathering of information other than through the public hearings. This information was typically collected through meetings and interviews with officials in various government departments and agencies, for example, Customs and Excise, the Royal Canadian Mounted Police, the Canadian Radio-Television and Telecommunications Commission



(C.R.T.C.), the Post Office, Department of Communications, and provincial film censorship or classification boards. Information from these sources has supplemented and complemented that gained through other means, and has been of significant help to the Committee.

The task of assimilating all the information presented to the Committee has not been an easy one. In the following discussion, however, we present what we believe to be the current situation in Canada with respect to pornography, its availability, use and harms.

## 2. The Availability of Pornographic Materials

When we consider pornographic material in Canada, we are dealing almost exclusively with material that is imported into the country, rather than material which is produced here. From the information we have it appears that a very small number of pornographic films are produced within Canada but that the production of other forms of pornography, for example, magazines and books is not undertaken for commercial purposes. The only obvious exception to this would be live shows in theatres and bars. Pornographic material coming into the country comes overwhelmingly from the United States. This is the case whether the material is magazines, films or videos. The only other identifiable source of material is European countries, but their contribution to the total volume is very much less than that of the United States. Importation of material and the role of the Customs and Excise and the R.C.M.P. in this regard is discussed in Section II of this Part.

Most people at the public hearings felt there to be an overwhelming pervasiveness of pornography in our society. We made our own attempts to discover what we could about the availability of pornography, rather than relying on these impressions, however forceful they may have been. We will document the basis of the Committee's conclusions on this issue, and in doing so, indicate the areas where our information is not nearly so clear or substantial as one would wish. While we conclude that there can be no doubt that in virtually all parts of the country, pornographic materials are indeed more widely available in 1985 than they were 15 years ago, this conclusion depends not on concise and comprehensive statistics, but on the piecing together of some statistics with indications, trends and general observations.

Research documenting the increased availability of pornography has become a matter of interest only recently. Indeed, until the completion of the research undertaken by the Committee on Sexual Offences against Children and Youths (Badgley Committee)<sup>8</sup> and the Department of Justice in support of our Committee, very little was known about the availability of pornography beyond the personal and anecdotal accounts of people concerned with the issue. The Report on Obscenity and Film Censorship (the Williams Report)<sup>9</sup> from the United Kingdom, points to a similar difficulty in documenting actual increases in the availability of pornographic materials, as do several studies from the United States.<sup>10</sup> It must be remembered, however, that some of the



work in the United Kingdom and the United States was completed before the introduction of pay television or the sudden explosion in the home ownership of video cassette recorders (VCRs).

Anecdotal accounts are, of course, an important source of information. They are, by no means, to be dismissed because they do not meet the current canons of social science research. Frequently, however, more information is required in order to be sure that one is not dealing with a highly aberrant situation. Nevertheless, it would be difficult to argue against the logic of the position that says that if some television stations are advertising adult entertainment and blue movies, and if films are now available on videotapes as well as in the theatres, pornography has indeed become increasingly available.

As indicated by the research conducted for the Badgley Committee, part of this increased accessibility occurs because more stores, and a wider range of stores, carry pornographic magazines and publications than previously.<sup>11</sup> Until relatively recently, pornographic materials were confined to a few stores in any city which were “known” to specialize in such materials. Now, a full range of the material is available in virtually any store which sells magazines. These include the thousands of corner or convenience stores used by people, including children, on a regular and frequent basis. Pornography is also more accessible in that it is not confined now to printed matter and films which can be seen only in theatres. Instead pornography is on television, particularly pay television, with the potential of being seen in virtually every home across the country. Where pay television is not accessible, the films can be seen on videotapes. Satellite transmission of signals is also starting to play a role in the distribution of pornography.

We know also that the print media and adult magazines are readily accessible not only to adults, but also to children, in every region. In the majority of instances, stores which sell adult magazines make no effort to segregate them from any other type of material. Although pornographic magazines are available throughout the country, there are some regional variations. Thus, the western provinces appear to have more of such material than do the eastern ones, with the exception of Québec. Québec is most like British Columbia in terms of the pornography available in its stores, leading to the conclusion that these two provinces are the most permissive with respect to sexually explicit material.

The information reported by the Badgley Committee is confirmed by the information from the National Population Study, in that 73% of the respondents were aware that adult magazines, movies and videos were available in their communities. Close to three-quarters of those participating in the survey concluded that pornography is easily available to anyone who wishes to see it.<sup>12</sup>

With respect to magazines, therefore, we are on firm ground in asserting that such magazines are more accessible than before, and that there has been a substantial increase in their sales over the past 16 years or so. The Badgley

Committee has the most comprehensive and extensive research to date on the availability and circulation of pornographic magazines in Canada.<sup>13</sup> They report that the circulation figures for 17 different magazines for the period 1965-1981 are 3.5 times higher per capita in 1981 than they were in 1965. In 1981 each Canadian bought 0.556 magazines, compared to 0.183 in 1965, with males, in particular, increasing their consumption from 0.364 magazines in 1965 to 1.121 in 1981.

It is undoubtedly the case that the increased availability of pornography, particularly of magazines, is related in part to an increase in the production of such magazines and their importation into Canada. By the 1980s the number of different titles had risen to 540, representing a sharp increase over the past 20 years. While it should be noted that many of these magazines publish only one issue so that the great increase in titles cannot necessarily be equated to an equally overwhelming increase in materials, the general conclusion has to be that more pornographic magazines are now being published than previously.

All the evidence which the Committee has considered leads to the conclusion we stated above that pornography is far more available today than it was 10 or 15 years ago. This availability results from the use of all forms of media, from an increased production in some forms, if not all, and from a distribution network that has increased significantly in size to take in a far wider variety of outlets than previously. Pornography is certainly part of the content of every form of the media and is easily available in every part of the country.

### 3. The Use of Pornography

The question of whether more people are actually using pornography is not, however, so easily answered. We lack consumer information from previous years, and are not able to make the necessary comparisons between the numbers of people who bought or saw pornography then and those who do so now. Circulation figures for magazines have clearly increased but this does not necessarily mean that more people are buying the magazines. Instead, it could mean that the same number of people who bought magazines in 1965, for instance, are now buying more because there is a greater variety of material available. Accordingly we must ask whether the increased availability of magazines results in a broader dissemination or in a greater concentration in use of the materials.

The information we have does not allow us to give an unequivocal answer to that question. Both trends seem to be occurring but we cannot be precise about the extent of either. The significance of the inquiry about consumption lies in people's theories about why pornography is harmful. The concerns we heard most often at the public hearings were that, for adults, exposure to or use of pornography beyond a certain point was harmful to the individual, groups in society and society as a whole. Implicit in the argument is that the amount of material which a person sees is a relevant consideration in determining whether



harm takes place. It is thought unlikely that an adult looking at one pornographic magazine or video would be harmed irretrievably, whereas, an adult, seeing this material to the virtual exclusion of all other forms of entertainment will develop a corrupted view of human relations. Somewhere between these two extremes, it is assumed that the average Canadian is likely to be harmed when the quantity of material used crosses the threshold between not being harmful and being harmful. The amount of material used is, therefore, crucial to the debate over whether a person is harmed by the material and may then go on to harm others.

There is also a view that a large number of people will be adversely affected by pornography that is pervasive. This argument focuses not on the heavy use of pornography by a few, but rather on use, beyond an acceptable level, by a large number of people. The effects of this pervasiveness theory are twofold. On the one hand, it is argued that the users themselves will be harmed because they acquire from pornography a distorted view. On the other hand, it is argued that harm will be suffered by the group that is portrayed in the material. Generalization of these portrayals throughout society will cause others to think of all members of the group in the way they think of those portrayed.

These different theories about the harms of pornography give rise to different suggestions about how best to deal with it. Thus, the Committee has had to contend with these different theories, as well with the related problem of what it is that people are actually seeing.

From the National Population Survey we know that 11% of Canadians over 18 years old (somewhat over two million individuals), bought at least one "adult entertainment magazine" in the preceding 12 months, i.e., sometime between June/July 1983 and June/July 1984. Men outnumber women buyers by a ratio of 3:1. A further 32%, or nearly 6 million individuals, did not buy a magazine but did leaf through or read one at least once during the previous year, with men again being far more likely to do so than women.

Apart from revealing that the consumer is likely to be male, the survey data indicated that the consumer has a number of characteristics which differentiate him from the non-consumer, although it is difficult to interpret why certain attributes might lead a person to buy magazines of this kind. All we can say at this stage is that those with less than eight years of education buy fewer magazines than those with more education; the unemployed are over-represented among those who buy the magazines; there is a tendency for young people to outnumber older buyers, for the single to outnumber the married and for consumers to come from Ontario and the West rather than Québec and the Atlantic region.<sup>14</sup> Clearly we need considerably more research before we can be confident in talking about the buyers of such magazines. Such research must address questions like why people buy these magazines, whether they buy only one or several, for how many years they buy them, and a whole host of similar questions relating to consumer motivation and behaviour.



The usage statistics of adult-only videotapes are virtually identical with those relating to the use of adult entertainment magazines, according to the National Population Study. Twelve percent of Canadians had bought or rented such videotapes in the previous year.

Although magazines and videos are often cited as the media which people use if they are seeking pornography, in fact most Canadians see on television what the National Population Study termed “adult entertainment”. Of the respondents to that survey, 57 percent said they had seen television programs showing nude adults at least once during the previous 12 months, 43% had seen programs containing scenes of heterosexual intercourse, 57% sex combined with violence and 67% sexual activity between people of the same sex.

While these data indicate the wide use of adult entertainment, caution is necessary in their interpretation. As will have been evident from the way in which the results have been presented, the survey dealt with what was termed “adult entertainment” and not pornography. Adult entertainment is probably a broader term than pornography in the minds of most people, and as we have outlined in a previous chapter, pornography itself has many connotations in everyday usage. The terminology used in the National Population Study, then, means that we cannot conclude from the survey anything about the use of the sort of pornography featuring images of perversion or degradation, in comparison with other categories of adult material. Indeed, it may well be the case that some of the material within the category of “adult entertainment”, while being inappropriate for children, could actually be considered erotica because it does not demean the nature of sexuality.

The only indication we have of the sort of material the respondents had in mind when answering the questions is in relation to magazines. As is confirmed from circulation figures, *Penthouse* and *Playboy* are the magazines bought most often, by 39% and 30% respectively of the respondents, followed by *Playgirl* (8%) *Hustler* (6%), then a whole variety of other magazines (7%). *Playboy* is read or leafed through by 38% of respondents, *Penthouse* by 23%, *Hustler* by 7%, *Playgirl* by 6%, and other magazines by 7%. These figures illustrate the overwhelming significance of *Penthouse* and *Playboy*. Whether or not one considers their content acceptable they are certainly the ones that most people see.

Although we can gain some indication of the total number of people who have been exposed to adult entertainment from the National Population Study and magazine circulation figures, we still do not have much information about actual patterns of consumption. We do not know, for example, the extent to which the same individuals buy the different magazines, producing a high concentration of usage rather than a widely dispersed but less intense exposure. For instance, the Badgley Report confirms that *Penthouse* and *Playboy* are the best selling magazines in Canada with monthly sales of 500,000 and 300,000 respectively. But we do not know whether 800,000 different Canadians each buy a copy of these magazines, or whether 300,000 of the half million people

who buy *Penthouse* also buy *Playboy*, or the exact extent of the overlap between buyers of one pornographic magazine and the buyers of another.

Nor are we very informed about the frequency with which individuals buy pornography. The survey figures indicate the numbers who have bought at least one magazine in the past 12 months but do not inform us of the numbers who buy such material every week or every month. Similarly, circulation figures such as those included in the Badgley Report tell us how many magazines are being bought in a month but not whether the same or different people buy them each month.

If one looks for information on the overlap between magazine users and users of other forms of the media, the only data available are from the National Population Study. While the figures reflect the influence of television, there is some overlap in the use of the different media. It is also noticeable that while nearly a third of the respondents use or see no adult entertainment material at all, two thirds do use or see such material. (See Table 1)<sup>15</sup>

Table 1  
Use of Adult Entertainment Magazines,  
Videos, and/or Television

<u>Material Used</u>	<u>Percentage</u>
None	31.5
Magazines only	6.8
Videos only	1.2
Television only	30.6
Videos & Magazines	1.4
Videos & Television	3.0
Magazines & Television	16.7
Videos, Magazines & Television	5.7
No Answer	<u>3.1</u>
TOTAL	100.0

The wide dissemination and viewing of sexually explicit material thus appears to be a well-established fact. Because of the terminology used in the National Population Study, we do not know whether all of this material would be pornographic in the way we have described that term in chapter 1 of this Section. Certainly we have received complaints during the public hearings about the content of *Playboy* and *Penthouse*. Similarly, we cannot answer whether the viewing of such material has reached a level which could be considered detrimental to either the general population or specific groups of individuals. The answers to these questions rest in part on our understanding of how pornography affects people, a topic which will be discussed later in this chapter. Before doing so, however, we must give further consideration to the content of the material being seen.



## 4. The Content of Pornography

The question most closely tied to the issue of who is consuming pornographic material is the question of exactly what it is they are seeing. That is, what is the actual content of the depictions or texts? This issue is of central concern in any debate about the value or harm to be attached to pornography. Again, however, the research literature is disappointing.<sup>16</sup>

Generally, studies have been confined to a limited number or type of magazines, and to short time periods in terms of comparison. As with other research on pornography, what is termed pornography can vary considerably from one study to another. It is also significant to note that given the importance of television as a source of adult entertainment, studies of the content of television programs available in Canada, and in particular, longitudinal studies which could document any change in content, are rare.

The research which has been conducted on magazines and videos does not confirm the overwhelmingly awful picture presented by some groups and individuals in their briefs to the Committee. We recognize, of course, that for some people, any film or magazine with a theme of sexual violence is one too many. But the view that large amounts of violent pornography or child pornography are being consumed is not substantiated by the research. Again, one can well argue that the pornography which is available does indeed portray women as degraded, sexual objects and that this is as harmful as portrayals of sexual violence. But, the idea that a great deal of the pornography has taken on the worst possible characteristics of the genre is unconfirmed at this time.

The Badgley Report, in a content analysis of the texts and pictorials of 11 popular adult magazines which were published in June, 1983,<sup>17</sup> stated that most of the depictions are of totally or partially unclothed women in positions which expose their genitalia. Violent images and themes were found in 1.3% of the pictorials and 4.1% of the texts. Children were not depicted in the pictorials but were part of the texts (4%) and of the advertisements (10%). Clearly, violent and child pornography is present but is not an overwhelming theme in these magazines.

It should, perhaps, be no surprise that the content of pornographic magazines changes as does the content of other media. What is difficult to know, however, is what pornography is changing from and to what. Again, we have to conclude that at this time we simply do not know.

The study which is most widely cited in support of the view that there is increasing violence in pornography is that conducted by Malamuth and Spinner.<sup>18</sup> These researchers analyzed the pictorials and cartoons of *Playboy* and *Penthouse* from June 1973 to December 1977. They found that violent images had increased, but that they did not in any event exceed 10% of all



cartoons and 5% of photographs and drawings. The change in content that Malamuth and Spinner reported is both minimal and marginal and could be accounted for by many other variables than simply an escalation in the violent content of the magazines. Again, the research does not lead us to any firm conclusions on the trends in the material.

Consider, also for example, some of the changes in content which may not be related to questions of violence. A 1982 study by Dietz<sup>19</sup> of 1,760 heterosexual pornographic magazine cover photographs stated that in 1970, lone women were the subjects of the majority of cover pictures whereas by 1981, this was the case for only 10.7%. Apart from the 1981 covers which could be said to display normal heterosexual relations between one woman and one man (57.9%), 17.2% portrayed scenes of bondage and domination (perhaps evidence of increased violence although sado-masochism is not necessarily exploitative), 9.8% group scenes and 4.4% transvestism or transsexualism.

What such changes in content indicate is difficult to interpret. The disappearance of lone women from pornographic magazine covers might be a positive development if it is interpreted as an indication that women are coming to be seen not just as sexual objects to be observed. There is some sense of context in that other people are included. On the other hand, the increased representation of the more extreme forms of sexual behaviour is not reassuring. Similarly, the notion that pornographic comics portray women as having the same sexual desires as men, could be regarded as positive by some who see it as an egalitarian approach.<sup>20</sup> Others, however, would argue that this denies the real nature of women's sexuality, particularly where depictions of male sexuality stress impersonality or aggression.

The one other area where we have some information with respect to content is video-cassettes. A study conducted for the Department of Justice in the lower mainland of British Columbia analyzed 150 videos, 58 rated as adult, restricted or x rated by the stores from which they were rented and 92 triple x rated.<sup>21</sup> This area of British Columbia has achieved a reputation as a major source of pornographic material and as an area where the more extreme varieties of sexually explicit material are available. It was believed, therefore, that in studying videos available in the lower mainland, some of the most extreme material available in Canada would be analyzed.

It was assumed that the "adult" videos would be less explicit and extreme in terms of their depiction of sexual and violent activities than the triple x videos. Having completed their analysis of the videos, however, the researchers conclude that the basis of the distinction between adult and triple x videos is not particularly clear. The 150 videos contained 4,203 separate scenes. An analysis of the scenes resulted in 50% (2,101) being excluded from further consideration because they did not include any sex, aggression and/or sexual aggression. Of the 2,102 scenes which did contain these elements, the following distribution was found:

Table 2  
Classification of Video Scenes by Content

Scene	% of scenes coded	% of all scenes
Sex	77.4	38.7
Aggression	18.7	9.4
Sexual Aggression	12.7	6.3
Other	—	50.0
N	(2,102)	(2,101)

(Note: the scenes total more than 100% because some scenes contained more than one element.)

While adult videos could be considered less extreme in that they contained fewer scenes involving sex, aggression or sexual aggression than did triple x videos, there was a clear increase over time in the depiction of sex scenes in the adult category. The triple x videos contained more sex scenes than the adult videos, although the number of these scenes decreased over time. The triple x videos also contained sex scenes that were considerably more positive than the scenes in the adult videos. That is, the participants were there by mutual consent and appeared to be enjoying the activity. This latter finding was contrary to the expectation that the triple x videos would contain the most dehumanized depictions of human behaviour.

Distinctions between the two types of videos are consequently difficult to make. While both types of videos do contain scenes of sexual aggression, violence and domination are not predominant themes. Rather, mechanical sexual relations, i.e. an absence of affection, love or passion and a concentration on the pure mechanics of sex between two adults of the opposite sex were by far the most common portrayals. None of the films involved children and only one percent and two percent of the adult and triple x films respectively involved those who were apparently teenagers. Further, the adult videos contained more scenes of aggression and particularly physical aggression than the triple x.

The incompleteness of the available research makes it difficult to reach any conclusions about the content of pornographic material. Certainly, there are depictions which the vast majority of Canadians would find completely unacceptable. These depictions appear, however, to be in a minority. About the majority of the depictions, there would be much more debate. The trends in the content of pornographic material are also hard to detect and equally difficult to interpret. The material is changing, but whether for the better or the worse is, as we have remarked, a matter of judgment.

## 5. Pornography and Harms

The concerns about the increased availability of pornography, its use by a wider range of people and the nature of current pornographic material, come together at the point of discussing the impact or harms that may be associated with pornography.



The debate about the harmful consequences of pornography is perhaps one of the most contentious and difficult debates of our time.<sup>22</sup> People hold very strong views about the harm that pornography causes. They argue that pornography is to be deplored simply for portraying people in an inhuman way or because it invites consumers of pornography to imitate the inhuman behaviour portrayed. In the latter instance, it is argued, non-consumers of pornography, especially women and children, are often victims of the consumers who want to act out the fantasies they see in pornographic material. Further, the argument runs, we are all victimized to the extent that a society which condones the portrayal of people in such degrading and inhuman ways is a society whose values are, at the very least, questionable. The exploitation of one group of people for the gratification and entertainment of another and for the gratification of the more extreme sexual desires of men is surely not consistent with the type or quality of society we would like to see and develop.

Against these arguments, it is maintained that pornography has not been demonstrably and systematically linked to individual, group or social harms. Until such a linkage is demonstrated and supported by reasonable evidence, the dangers of invoking strict control of the material or of censorship, outweigh the potential, but unproven, harmful impacts of pornographic material. It is suggested that those who consume pornography are, like consumers of other mass media, only too well aware of the fantasy involved in pornography. Thus pornography does not cause or encourage people to act in inhuman ways. Indeed, the argument is also made that the material has a cathartic effect, allowing individuals to vent their anger and hostility vicariously. To the extent that such is the case, then pornography is not only harmless but actually beneficial to individuals and society.

It has also been suggested that the prevalent fascination with pornography is a reflection of our unease with ourselves as sexual beings. The past 20 years has seen the culmination of significant change in the sexual mores of large numbers of people within Canadian society. This has by no means been an easy transition or one with which everyone agrees, and the debate over the causes and consequences of pornography in many ways typifies the fundamental disagreements and disputes over sexual behaviour and values.

For some, pornography is merely an aberration associated with an opening up of a formerly repressed and little understood area of our lives. This line of reasoning suggests that pornography will disappear as we move to a more complete and thorough understanding of our sexuality. In its place we will see an increase in erotic literature, the portrayal of sexual activities which are mutually pleasurable and represent the exercise of real choice by each of the partners. In the meantime, the dangers associated with attempting to censor the content of the mass media are greater than the supposed harms that result from the availability of pornography.

For others, the pornography which is available today is so abhorrent and harmful that immediate action is needed to prevent or curtail access to it.



Governments are called upon to pass legislation which would allow for the effective control of what is seen to be extremely offensive and harmful material.

Our concern has been to determine whether or not all the available evidence would lead us to support one of these views rather than the other in the debate about the impacts of pornography. Although certain aspects of the issue are more amenable to empirical study than others, we recognize that academic researchers have been for some time now addressing the question of the impacts of pornography, and in particular, the harms which might be associated with its availability and use.

We have noticed, however, in the course of the public hearings, two distinct schools of thought about what research data must show in order to justify legislative action on pornography.

Those who see freedom of speech as the highest value argue that the data must demonstrate that concrete harm to individuals is caused by pornography, in order to support controls on it. They reject the idea that controls can be justified by a showing of some generalized harm, or by showing (or arguing) that pornography impairs the realization of other social values. Thus, they reject the contention of the conservatives that controls can be justified because pornography fosters disintegration of the moral values of society, the place of the family, and the sanctity of marital sexual relations. They also reject the contention of feminists that controls on pornography can be justified because pornography impedes the realization of equality for women and diminishes their humanity.

The advocates of free speech as the highest social value thus take a distinct position on what research should demonstrate. They also are firm about how they think the harm should be demonstrated. Their expectations are that before legislative action can be justified, there must be a clear or definite showing of the link between pornography and measurable harm to individuals. When measured against these two standards, the existing research, not surprisingly, falls short. There has been considerable research on the pornography harms issue, but most of it has occurred in the last 15 years, inspired at least in part by the publication of the U.S. Commission on Obscenity and Pornography<sup>23</sup> and the tremendous controversy it generated. As we elaborate below, this research has, as yet, given us few firm conclusions about what actual harms can be attributed to pornography. Clearly, to satisfy those who adhere to what we have previously described as the liberal philosophical view, the research must become more systematic and co-ordinated.

Let us now consider a quite different point of departure for regarding the work of pornography researchers. The basis for this other view is not the guarantee of freedom of expression which is now embodied in section 2(b) of the *Charter of Rights*. Rather it is the guarantee of equality which is found in sections 15 and 28. In particular, the point is made that these two provisions

guarantee to women equality with men, including the right to the equal protection and the equal benefit of the law.

Proponents of this view argue that pornography undermines this guarantee, by portraying women as less than human, demeaned, and subordinate. They cite the impairment of the guarantee of equality as itself a harm done by pornography, reasoning that a society which accepts and fosters the portrayal of women in this fashion cannot in fact be committed to the realization of their equality. The more the pornographic message is tolerated, by, for example, refusals to penalize its most odious expressions or to control its dissemination, the longer will our efforts to realize equality be delayed.

Those who choose the equality guarantee as their point of departure approach the question of what the data should show to justify legislative intervention in quite a different way than do those who reason from the freedom of speech premise. They point out that those who seek to assert the freedom to voice virulent anti-egalitarian sentiments or purvey such images should be called upon to show that the messages do not harm the equality principle. They say that the data on pornography to date have demonstrated no beneficial effects of pornography: given that it cannot be shown to be useful, and does convey a demeaning message that inhibits equality, it is deserving of very little constitutional protection. These arguments entail the clear suggestion that the level of constitutional protection afforded to messages that are *prima facie* anti-egalitarian, would increase to the extent that such material could be shown to have a countervailing beneficial purpose.

The proponents of this equality approach are, of course, more tolerant of the existing shortcomings of empirical research about the actual harms to individuals of pornographic material. They point out that the momentum of such research is in the direction of being able to show harms, and that by contrast there is no research documenting the beneficial effects of pornography. Therefore, on balance, there has been some empirical showing which supports the argument in principle.

The differences between these two approaches to the data are quite striking. The egalitarian approach does not require that the whole burden of justifying legislation should fall upon the research data; the libertarian approach does. Moreover, the libertarian approach imposes, in effect, a very high burden of proof before the data will be taken, in the words of section 1 of the *Charter of Rights*, demonstrably to justify incursions on freedom of expression. By contrast, the egalitarian approach regards the issue of harm (and consequently justification for restraint) as resolved at least in part by the theoretical argument, coupled with empirical observation about the nature and impression of pornographic messages. Thus, its expectations about the amount and nature of empirical evidence supporting controls on pornography are not as stringent as those of the libertarians.

It is quite evident, however, that the bulk of the research on pornography has been conducted in order to address the question of harms associated with



exposure to pornography. Studies demonstrating that pornography does not impede women's equality rights, for instance, are as far as we could determine, non-existent. In recasting the question to be studied we are, therefore, opening up a new area to be researched. In the meantime, we must consider the research which is available in order to understand what it says about the impacts of pornography.

Although the Committee was frequently told that research studies clearly demonstrate that harms to society and to individuals were associated with the availability and use of pornography, we have had to conclude, very reluctantly, that the available research is of very limited use in addressing these questions. We want to articulate our position very clearly: the Committee is not prepared to state, *solely on the basis of the evidence and research it has seen*, that pornography is a significant causal factor in the commission of some forms of violent crime, in the sexual abuse of children, or the disintegration of communities and society. Pornography may, indeed, be a prime factor in each of the undesirable consequences mentioned but, *based solely on the evidence we have considered*, we cannot at this time conclude that such is the case.

This conclusion appears to run counter to what a great many people argued in their briefs to the Committee. Yet it seems to follow from a careful analysis of the research. We consider, however, that it is extremely important to note that this conclusion is drawn, not because the research positively demonstrates the lack of linkages between pornography and anti-social behaviour, or that pornography causes positive outcomes, but because the research is so inadequate and chaotic that no consistent body of information has been established. We know very well that individual studies demonstrate harmful or positive results from the use of pornography. However, overall, the results of the research are contradictory or inconclusive.

There are several reasons why the existing research is so unhelpful in the debate about pornography. Perhaps most fundamentally, the various researchers proceed upon different definitions of pornography. Thus, when one attempts to make comparisons between studies or to draw together the conclusions of several pieces of research, one finds that one is not dealing with a constant phenomenon. Some definitions are so specialized to the experimental situation of which they are part that they have virtually no use in other contexts. Other definitions are so general that they are essentially unusable in everyday situations or when one is attempting to draft legislation which will control those elements which are seen to be undesirable.

Definitions of pornography in the research literature include the portrayal of a whole range of explicit sexual acts, sometimes without any violence involved; sex and violence; violence without sex; and a large number of contextual factors, all of which can affect the definition of the material as pornographic.<sup>24</sup> There is, therefore, no accumulated body of research which deals consistently with the same phenomenon. Rather, we have hundreds of pieces of research each dealing with portrayals of a discrete form of behaviour.



The limitations of the research also arise out of the methodology used in many studies. A great deal of the research relating to pornography has been conducted using the standard experimental designs and techniques of social psychologists. Such studies are typically designed to answer the question "What effect, if any, does the viewing of pornographic material have on the viewer?" The research attempts to provide the answer to questions about the consumption of pornography in general by studying the response of those in the experimental situation, typically male university undergraduates.

All research conducted through such experimental methods confronts two problems. Firstly, can the researchers be sure that the change in the person is indeed caused by the designated stimulus, in this case the viewing of pornography? Secondly, even knowing how the subjects in the experiment reacted, what does this allow us to say about the population in general? There is, we acknowledge, some comfort to be taken from the research methodology. Researchers' confidence about the causes of attitudinal changes increases to the extent that they find people reacting in similar ways as experiments are repeated with new subjects. Similarly, the extrapolation of experimental results to people outside the experiments proceeds with more confidence when the researchers have a good theoretical understanding of why, for instance, people's attitudes may change in the way they do. Once one understands why something is occurring then one is better able to describe what sorts of people may react in a particular way under particular circumstances.

Unfortunately, the research on pornography does not demonstrate a high level of consistency of results between different experimental situations. In addition, attempts to integrate research findings into more systematic explanatory systems are few and far between.

It will also be apparent that the type of research discussed above can address only certain sorts of issues. Thus the research is typically designed to investigate the effects of seeing a considerable amount of pornography in a relatively short time. The effects which are measured are usually changes in attitude that are apparent immediately or a short time after viewing the material. Such research cannot address the effects of consuming pornography over long periods of time, for instance, whether there is a cumulative effect as people read and see pornography over months and years. Nor can it deal adequately with the issue of whether specific attitudes or changes in attitudes are related to subsequent behaviour. Holding a particular attitude may be a prerequisite to acting in a specific way. We know, however, that people do not always act in the way predicted because there are all sorts of other factors which intervene. The relationship between attitudes and behaviour is, after all, not a simple one.

A further issue not readily amenable to research in the laboratory, is that of the impact of pornography on people who may not be considered an "average Canadian adult". Such people may be especially vulnerable to the messages contained in the material. Children fit this category, but it will be obvious that for ethical reasons one cannot expose children to large doses of

pornography for experimental purposes, in case it does indeed adversely affect their attitudes and behaviour. A second category is people who may already be predisposed towards violent sexual behaviour who find in pornography the ideas or legitimization for the acts they wish to perpetrate. Again, these people will not be found in laboratory experiments because of ethical considerations and because typically, we have no way of identifying the potentially violent until they are indeed violent. The effects of pornography on such people, therefore, remain unknown and will have to be investigated by means other than laboratory research, something which is yet to be done on any extensive or systematic basis. The small amount of evidence we have available so far is, again, inconclusive.

There are reports that some children who are sexually abused are required to perform in ways depicted in adult pornography. Similarly, some reports from battered women indicate that their husbands use pornography and that they expect their wives to imitate the behaviour portrayed. Research in these areas is relatively new, and it does not seem that the question of whether pornography is a precipitating factor in the illegal or anti-social behaviour has often been included in the research studies.<sup>25</sup> While we might expect that it will be included in the future, the untangling of what may be causal or predisposing factors versus factors which are present but simply coincidental to the behaviour being studied, will be difficult. The same argument can be made with respect to those convicted of sexual crimes. The question of whether pornography is a factor in their crimes has not been fully studied and requires further attention.<sup>26</sup> As with so many other areas within the pornography debate, we have to conclude that we do not know at this time whether pornography is or is not linked to various forms of behaviour.

The discussion about the relationship between pornography and sex crimes has been long, acrimonious and inconclusive.<sup>27</sup> Most of this debate has focused on the correlation between the increased availability of pornography and the increase in sex crimes, rather than an analysis of the behaviour of sex offenders. Correlational research is fraught with difficulties. As we have indicated earlier in the chapter, describing and documenting the increased availability and use of pornography is no easy task. Given the difficulty of dealing with definitions of sex crimes which change over time, and the problems of the under-reporting of crimes, it is evident that documenting the rise and fall in sex crimes is equally problematic. Any undertaking which depends on putting these two very difficult areas together is obviously going to give very speculative results. In view of this, it is not surprising that most discussions of the issue conclude that the evidence for the supposed relationship between the increase in pornography and the increase in sex crimes, is not conclusive.

As suggested earlier, social-psychological research does not address the issue of long-term use of pornography. In particular, the issue of relatively low levels of exposure or use of the material over long periods of time is not amenable to experimental research. And yet, it is possible that this sort of use is characteristic of most people. Leafing through *Penthouse* or *Hustler* at the



barber's, or watching the occasional adult movie on television, may be as much pornography as many Canadians see. Does this sort of use and the fact that we may be aware of the magazines in the corner grocery, lead us to accept and take for granted the themes portrayed in the material and in so doing, cause subtle shifts in our values and views about human relationships? We do not know. Here again there are enormous difficulties in separating out what value, attitudinal or behavioural changes are occurring and then attempting out of all the experiences people have, to determine whether or not pornography is a significant factor. On the one hand, the mass media are enormously influential in our lives. Advertisers, as a group, spend large amounts of money to try to change aspects of our behaviour. Whether all aspects of our behaviour are equally susceptible to change and whether our values, for example, about human dignity or equality, are also likely to shift as a consequence of seeing certain types of material in the media, are issues in need of study. Yet again, our current information is inconclusive.

Perhaps the most central issue of all which requires attention is that of defining what it is that makes material pornographic. While many studies concentrate on the effects or impacts of pornography, few deal with the question of what pornography is. The question needs careful and systematic consideration because if pornography is indeed in the eye of the beholder, as opposed to being definable in relatively precise and clear terms, then the issue of harm to individuals and society becomes increasingly difficult to address.

As we suggested earlier in the chapter, some issues in the pornography debate are not amenable to the sort of empirical research we have so far been discussing. The issue of harm to the values which we believe should be the foundation of Canadian society is a case in point and of particular importance.

While Canadian society is an amalgam of different cultures and traditions, we believe that the philosophical principles we have discussed in the first part of our report have the strong support of Canadians. These values address the fundamental nature of human beings and the sort of society which we consider generations of Canadians have been striving to achieve: sometimes successfully and sometimes not. Our social, economic and legal programs are directed towards our attaining a society in which these fundamental values are not only supported but actually reflected in the lives our citizens are able to lead. Anything, therefore, which is seen to undermine or work against this possibility has to be considered very carefully. Is the matter in question undermining the values we espouse and, if so, what course of action should be undertaken to stop or overcome the trend?

While the question of support for common fundamental values in Canadian society can be pursued through sensitive and well-designed empirical research, there has been no such research to date. In part, therefore, our statement that the values are supported rests on what we ourselves believe to be the guiding principles of Canadian society, demonstrated through official statements and action over the years and inferred from what people told us at the public hearings.



The second part of the argument, whether pornography undermines or inhibits the achievement of these values is the crux of the matter. The answer depends on how one reconciles conflict between fundamental values like equality on the one hand and freedom of speech on the other.

In the view of the Committee, there are magazines, films and videos produced solely for the purpose of entertainment whose depiction of women in particular, but also, in some cases, men and young people, demeans them, perpetuates lies about aspects of their humanity and denies the validity of their aspirations to be treated as full and equal citizens within the community.

We agree with the Justice and Legal Affairs Committee's statement made in 1978:

This material is exploitive of women - they are portrayed as passive victims who derive limitless pleasure from inflicted pain, and from subjugation to acts of violence, humiliation and degradation. Women are depicted as sexual objects whose only redeeming features are their genital and erotic zones which are prominently displayed in minute detail.<sup>28</sup>

Because of the seriousness of the impacts of this sort of pornography on the fundamental values of Canadians, we are prepared to recommend that the *Criminal Code* has an important role to play in defining what material may be available within our society. Where it is not so clear that the material has the impact described above, we are suggesting instead of criminal prohibition more restricted access than is currently the case. Our proposals and the rationale for them are described in detail in the next chapter.

## 6. Views About Pornography

Data from the National Population Survey indicate that Canadians have widely differing views of what they would term acceptable or unacceptable material. In part, each view rests on the content of the material but it also depends heavily on who might be watching or seeing the material and the way in which the material is presented. Many Canadians appear relatively conservative in terms of the material they define as unacceptable, in allowing access to the material and in the methods they support for controlling the material. These opinions are not, however, by any means unanimous and just as one finds Canadians who would like a very restrictive regime with regard to sexually explicit materials, so there are other Canadians who contend that individuals should be free to produce, distribute and use such materials, unless others are demonstrably harmed in the process.

The following table gives an overview of the respondents' feelings about the acceptability of certain types of material.

Table 3<sup>29</sup>  
 Level of Acceptability  
 Towards Sexually Explicit Material

<u>Statement</u>	<u>Extent of Agreement</u>		
	<u>Agree</u>	<u>Neither</u>	<u>Disagree</u>
All sexually explicit material for adult entertainment is obscene	31%	23%	42%
Sex magazines are unacceptable in our society	45	18	35
Use of sexually explicit materials by adults is unacceptable	32	20	43
Everyone has the right to view sexually explicit material as long as it is done in private	66	15	16
Everyone has the right to produce sexually explicit materials so long as it does not hurt anyone	32	15	50

Overall, one has to conclude that Canadians are quite evenly divided in their opinions of what is acceptable and unacceptable. There is, however, stronger support for the view that people have a right to *see* sexually explicit material than they have the right to *produce* it. Table 3 gives us only a very broad view of the material which is acceptable or unacceptable. Not surprisingly, the acceptability of material depends on its specific content and the potential audience. Whether the material is available in magazines, on film or on television has little impact on the level of acceptance although there is support for specific action related to each of the media. In terms of content, respondents rated material which contained sex and violence most unacceptable, followed by homosexual intercourse, heterosexual intercourse and one or more nude men. Material containing one or more nude women was rated the most acceptable. While respondents thought viewing by themselves or other adults as reasonably acceptable, they were strongly opposed to children being allowed to view the material.<sup>30</sup>

A majority of the respondents think that pornography is a problem in Canada (59%), although not as significant a problem as other social and economic issues. Indeed, only 1% of the respondents indicated that pornography is a major problem. Nevertheless, people hold very decided views about the harms associated with the use of pornography. That the viewing of violent sexual material leads people to commit acts of violence is believed by 69% of the respondents, and 48% of respondents believe that people imitate in real life the scenes they see in the violent sexual material. In addition, respondents were of the opinion that sexually explicit magazines are degrading to women (67%) and more degrading to women than men (66%).<sup>31</sup>

As may be expected, respondents' views on the control of pornographic material vary in accordance with their level of acceptance of such material.<sup>32</sup> While most people (59%) thought that the government had to take the lead role in controlling sexually explicit material; this view was held most strongly by those who found the material particularly unacceptable. Conversely, those who are more accepting of the material tend to favour personal or family

discretion. There is, however, a strong sentiment, held by two-thirds of the respondents, that the police and censor boards should have more power to deal with sexually explicit material.

Respondents generally favour greater control by authorities when the material is considered to be more extreme, for example, violent sexual scenes. Some 38% of respondents suggest that magazines containing sexual violence should be banned. Thirty-one percent suggest that such films should not be allowed on television at times when children and juveniles are likely to be part of the audience and a further 25% would ban the material altogether from this medium. Similar responses are found in relation to films in movie theatres, with 36% of the respondents suggesting that such movies be banned entirely. Only when works in art galleries are considered do the respondents opt clearly for less restrictive measures and prefer family discretion. The following table summarizes responses to different types of material in the media. While indicating a preference for more control over the material being exercised, it is also apparent that respondents want to limit the access of children to such material and feel that warnings about the nature of the material should be given. Responses to the question of control and access to pornography are shown in Table 4.

Given the diversity of opinion on many aspects of the issue, it is apparent that any recommendations on the control and accessibility of pornography will be controversial. Although nearly three-quarters of the respondents thought it very important that action be taken to deal with violent sexual material and material to which children might have access, consensus over how exactly to deal with these two issues does not exist at this time.



Table 4<sup>33</sup>  
Actions to Deal with Sexually Explicit Scenes in Different Media

Scene and Media	Nothing/ Personal or Family Discretion	Remove Offensive Parts	Forbid		Fine or Jail Producer	Ban Such Material	No Answer
			Presentation Access/ Selling to Children	Advertise It May Offend			
Violent sexual scenes shown in magazines	9%	14%	13%	13%	4%	38%	9%
Sexual intercourse between two adults of the same sex in entertainment magazines	13	9	18	13	4	35	8
Entertainment magazines, which could be sold at a local store or newsstand, which include pictures of nude men	19	7	34	11	3	19	7
Late night entertainment programs showing sexual intercourse between a man and women	31	11	—	27	3	19	9
Entertainment programs on TV which show nude adults at hours when children might be watching	13	9	31	12	2	25	8
Unrestricted entertainment movies which show nude adults	24	12	19	12	2	12	19
Theatres restricted to adults which show sex associated with violence	12	13	11	16	3	36	9
Sexually explicit paintings in an art gallery	49	5	10	17	1	11	7

## Footnotes

- <sup>1</sup> Jayewardene, Juliani and Talbot, *Prostitution and Pornography in Selected Countries*; W.P.P.P.#4; Kiedrowski, and van Dijk, *Pornography and Prostitution in Denmark, France, West Germany, The Netherlands and Sweden*, W.P.P.P.#1, Sansfaçon, *Agreements and Conventions of the United Nations With Respect to Pornography and Prostitution*, W.P.P.P.#3, Sansfaçon, *Pornography and Prostitution in the United States*, W.P.P.P.#2; Taylor, *The Development of Law and Debate in the United Kingdom in Respect of Pornography and Obscenity*, W.P.P.P.#14.
- <sup>2</sup> Boyd, *Sexuality and Violence, Imagery and Reality: Censorship and the Criminal Control of Obscenity*, W.P.P.P.#16.
- <sup>3</sup> Kaite, *A Survey of Canadian Distributors of Pornographic Material*, W.P.P.P.#17.
- <sup>4</sup> Palys, *A Content Analysis of Sexually Explicit Videos in British Columbia*, W.P.P.P.#15.
- <sup>5</sup> El Komos, *Canadian Newspapers Coverage of Pornography and Prostitution, 1978-83*, W.P.P.P.#5.
- <sup>6</sup> Peat Marwick and Partners, *National Population Study of Pornography and Prostitution*, W.P.P.P.#6.
- <sup>7</sup> McKay and Dolff, *The Impact of Pornography: An Analysis of Research And Summary of Findings*; W.P.P.P.#13.
- <sup>8</sup> Badgley Report Vol. II.
- <sup>9</sup> Williams Report.
- <sup>10</sup> See for instance: B. Heinrich, *Extent of Child Pornography in Texas*, Texas Legislature House Select Committee on Child Pornography, Austen, Texas, 1978, and L. Lederer (Ed.), *Take Back the Night: Women on Pornography*, (New York, Morrow, 1980).
- <sup>11</sup> See Badgley Report, Vol. II, Chap.54, at 1243-1268, for a discussion of the availability of pornography.
- <sup>12</sup> Peat Marwick & Partners, *op. cit.* at III.23-26.
- <sup>13</sup> Badgley Report, Vol. II, Chap. 54.
- <sup>14</sup> Peat Marwick & Partners, *op. cit.* at III.15-23 for discussion of use patterns and the material seen.
- <sup>15</sup> *Ibid*, Exhibit 38.
- <sup>16</sup> McKay and Dolff, *The Impact of Pornography: An Analysis of Research and Summary of Findings*, W.P.P.P.# at 31-36 for a discussion of pornographic materials.
- <sup>17</sup> Badgley Report, Vol. II, Chap.53, at 1213-1241.
- <sup>18</sup> N. Malamuth and B. Spinner, "A longitudinal content analysis of sexual violence in the best-selling erotic magazines", *Journal of Sex Research*, 16 (1980) at 226-237.
- <sup>19</sup> P.E. Dietz, "Pornographic Imagery and Prevalence of Paraphilia", *American Journal of Psychiatry*, 139 (1982) at 1493-1495.
- <sup>20</sup> D.E. Palmer, "Pornographic Comics: A Content Analysis," *Journal of Sex Research*, 15 (1979) at 285-298.
- <sup>21</sup> Palys, *A Content Analysis of Sexually Explicit Videos in British Columbia*, W.P.P.P.#15.
- <sup>22</sup> See for example: T. McCormack, "Feminism, censorship, and sadomasochistic pornography", *Studies in Communications*, 1 (1980) at 37-61; and "Passionate Protests. Feminists and Censorship", *Canadian Forum*, 697 (March 1980); McKay and Dolff, *The Impact of Pornography: An Analysis of Research and Summary of Findings* W.P.P.P.#13 at 8-15.
- <sup>23</sup> Commission on Obscenity and Pornography, *The Report of the Commission on Obscenity and Pornography*, U.S. Government Printing Office, Washington, D.C., 1970.

- <sup>24</sup> McKay and Dolff, *The Impact of Pornography: An Analysis of Research and Summary of Findings* W.P.P.#13 at 15-22 and 83-85.
- <sup>25</sup> M. Cini, *Causes of Wife Assault, a Review of the Literature*, Department of Justice, Ottawa, 1984. (Draft report).
- <sup>26</sup> See for instance M. Ragault, *Pornography and Violent Sexual Offenders, A Preliminary Research Report*, Department of Justice, Ottawa, 1983. (Unpublished report).
- <sup>27</sup> See the discussion in The Williams Report, Chap.6, paras. 22-59.
- <sup>28</sup> House of Commons Standing Committee on Justice and Legal Affairs, *Report on Pornography*, (1978) Proceedings No. 18.
- <sup>29</sup> Peat Marwick, *op. cit.* Exhibit 27.
- <sup>30</sup> *Ibid.*, at III.2 - 8.
- <sup>31</sup> *Ibid.*, at III.9 - 15.
- <sup>32</sup> *Ibid.*, at III.28 - 39.
- <sup>33</sup> *Ibid.*, Exhibit 49.



## Section II

# Pornography and the Law

## Summary

In this part of the Report we review the history of the law on pornography in Canada. In fact, because the term “pornography” has never been mentioned in our *Criminal Code* and it has never been defined in Canadian law, the discussion has to do with how our courts have struggled with what have been called “Canada’s obscenity laws”.

We first examine how the original common law test of obscenity was imported into our law from England and was subsequently replaced by the present statutory definition of “obscene”.

We go on to discuss all the relevant existing sections of the *Criminal Code*. For convenience they are discussed under two headings, *Pornographic Materials* and *Pornographic Performances*. We review the utility of the present legislative scheme and the important interpretations given to many of the sections by our courts.

There have been various proposals for reform in our obscenity laws since the last major statutory revision of the *Code* in this area in 1959. We review the more significant of these proposals.

After a discussion of the implications of the *Charter of Rights and Freedoms* on the question of pornography, we then review the pertinent provisions of other federal legislation: Canada Customs, the Postal Service and Broadcasting and Telecommunications.

Finally, the last three chapters of this Section respectively study how human rights legislation, film classification and censorship, and municipal law affect the issue of pornography.



## Chapter 7

# The Criminal Code Provisions

### 1. The Meaning of Obscene

The first general statutory prohibition of obscenity was contained in section 179 of the first *Criminal Code* enacted in 1892.<sup>1</sup> Under this section it was an indictable offence to knowingly and without lawful excuse publicly sell obscene material or expose obscene material for public sale or to public view. The section did not include a definition of the term “obscene” and in order to apply the section the courts were forced to devise their own legal standard.

They did so by adopting the so-called *Hicklin* test devised by Chief Justice Cockburn in 1868 in *R. v. Hicklin*.<sup>2</sup> That test asked:

whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to immoral influences, and into whose hands a publication of this sort may fall.<sup>3</sup>

and so began the difficult exercise of employing judicial interpretation to remedy statutory inadequacy.

Not surprisingly, the *Hicklin* test was subjected to severe criticism, not only from commentators who were interested in the state of the law, but also by judges of succeeding generations who attempted to apply it.

Chief among the criticisms were these:

- (a) The test is flawed, firstly, because the phrase, “a tendency to deprave and corrupt” is unclear and secondly, because it is subjective: a judge or jury must infer the “tendency to deprave and corrupt” from the material itself without the aid of expert evidence of the actual impact of the material on those who encounter it;<sup>4</sup>
- (b) The test is based on the tendency of the material to corrupt the most vulnerable individuals such as youths or abnormal adults and, therefore, places an unwarranted restriction upon the materials available to normal adults;<sup>5</sup>
- (c) The creator’s purpose and the literary, artistic or scientific value of the material is irrelevant. Furthermore, material may be found to be obscene on the basis of isolated passages rather than a consideration of the work as a whole.<sup>6</sup>



In spite of these criticisms, the courts were left to struggle with the *Hicklin* test for 67 years without benefit of any more precise statutory definition. It was not until 1959 that the *Criminal Code* was amended to provide a definition of the word “obscene”<sup>7</sup>, which by then appeared in several different provisions of the *Code*. The section is now 159(8) of the *Code* and it provides:

159(8) For the purposes of this Act any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

It is apparent that this amendment was intended to provide a statutory definition of the word “obscene” wherever that word is used in the *Criminal Code*, at least in the context of “publications”.

As we will see when we examine other sections of the *Code*, words such as “immoral”, “disgusting”, “indecent” and “scurrilous” are also used as constitutive elements of offences in this area, sometimes on their own and sometimes in conjunction with other terms, including “obscene”. Experience has shown, however, that it is the concept of obscenity that provides the governing standard.

The new statutory definition of “obscene” presented some new problems for the courts. It was immediately necessary to determine what effect the section had on the *Hicklin* test. Did it replace it or complement it?

It was clear from statements made by the Minister of Justice when the legislation was introduced that the new statutory definition was not intended to replace the common law test. It was said that it was introduced in order to create an alternative test, which the government believed would be more effective in the prosecution of some of the new publications that had started to appear on newsstands. However, as some critics noted at the time, the government’s intention to establish what was really to be a dual test of obscenity was certainly not clearly expressed in the new section.<sup>8</sup>

In the first cases heard after the enactment of the new definition, the courts declared that the *Hicklin* test continued to exist alongside the new statutory test.<sup>9</sup> However, this brief period of judicial agreement ended the first time the point was considered by the Supreme Court of Canada, in *R. v. Brodie, Dansky and Rubin*.<sup>10</sup>

By a majority of five to four the court held that D.H. Lawrence’s novel, *Lady Chatterley’s Lover*, was not obscene. Four judges found that the *Hicklin* test should no longer be applied to publications,<sup>11</sup> two judges held that it should continue to apply,<sup>12</sup> two judges expressly refrained from deciding the issue,<sup>13</sup> and one judge expressed no opinion but applied only the new statutory test.<sup>14</sup>

In the aftermath of the *Brodie* case and the failure of a majority of the Supreme Court to decide the status of the *Hicklin* test, it was left to the lower courts to resolve the question as best they could. They chose predominantly to apply only the statutory definition of obscenity.<sup>15</sup>

The confusion surrounding the *Hicklin* test was resolved to some considerable extent by the Supreme Court of Canada in its 1977 decision in *R. v. Dechow*.<sup>16</sup> The court had to decide whether the *Hicklin* test or section 159(8) should be applied in deciding whether certain sex aids were obscene. The majority of the court found that section 159(8) was the sole test of obscenity in relation to what the section referred to as a “publication”. The majority gave a fairly sweeping definition to the term “publication” and found that the sex devices in question were publications because the accused had made their character “publicly known” and had issued them for public sale.

The minority held that section 159(8) was an exhaustive definition of obscenity where exploitation of sex was concerned, regardless of whether or not a “publication” was involved.

The practical result of the *Dechow* decision is that if a test of obscenity is to be applied other than the definition contained in section 159(8), the charge would have to involve either something falling outside the sweeping definition of “publication”, or something that does not involve the exploitation of sex.

It seems clear, therefore, that only a few cases would not be governed exclusively by the statutory test contained in section 159(8).

We come now to consider the substantive meaning of the statutory test. It has been in force for 26 years and has been subjected to intensive and extensive judicial analysis. The courts have done their best to overcome the almost impossible task of giving contemporary meaning to abstract statutory provisions, while at the same time coping with the doctrine that precedent should be observed so that the application of the law will be predictable.

As might be expected, the criteria developed in the early cases to give flesh to the bare words of section 159(8) have been refined over time and some have even been abandoned. There is a host of decided cases and while extensive reference to the evolution of the various criteria is of interest to legal scholars, we shall, for the sake of brevity, attempt to provide as concise a statement as possible of the criteria presently being used.

Since the first treatment of section 159(8) by the Supreme Court of Canada in *R. v. Brodie* in 1962, the test of obscenity has been divided into two major elements:

- (1) Whether a *dominant characteristic* of the representation amounts to exploitation of sex or of sex and crime, horror, cruelty or violence.
- (2) Whether this exploitation is *undue* in the sense that it exceeds the contemporary Canadian community standard of tolerance.

For some time there was great uncertainty over whether the artistic purpose, artistic merit or scientific value of the material formed separate elements in the section 159(8) test, and, if so, how they were to be balanced against the two major elements. However, as will be seen, it seems now to be



reasonably well established that the factors of purpose, merit and value are to be incorporated into each of the two major elements and are not to be independently weighed and balanced against them. This is the case even though, as we shall see, section 159(3) makes provision for a public good defence which itself involves an inquiry into factors such as these.

The first of the major elements has proven to be relatively uncontroversial. The court must determine what are the dominant characteristics of the material. It has been decided that if the material has more than one dominant characteristic it is only necessary for the Crown to prove that the exploitation of sex constitutes one such characteristic. To make such a determination, the material is examined as a whole with each part considered in context. It is also necessary for the court to examine the literary or artistic merit of the material. The courts have held that in determining the merit of the material, it is desirable, but not essential, that there be expert evidence.<sup>17</sup>

Finally, the theme or artist's purpose must be determined and the court must decide whether the sexual episodes play a legitimate role in the development of that theme or purpose. Are the episodes justified by what has been called the "internal necessities" of the theme?<sup>18</sup>

However, this element of the section 159(8) test now appears to be of very little practical importance. In virtually all recent obscenity cases it has been beyond doubt that a dominant characteristic of the material in question is the exploitation of sex and, in fact, the issue has generally been conceded by the accused.<sup>19</sup>

The more contentious element of the section 159(8) test is whether the Crown can prove beyond a reasonable doubt that the exploitation under the section is *undue*. Some observers have said that the term "undue exploitation" is a contradiction in terms and that no exploitation can reasonably be considered to be *due*. In any event, the standard of legal interpretation was first set out by Mr. Justice Judson in delivering the majority judgment in *R. v. Brodie*:

Surely the choice of courses is clear cut. Either the judge instructs himself or the jury that undueness is to be measured by his or their personal opinion and even that must be subject to some influence from contemporary standards - or the instruction must be that the tribunal of fact should consciously attempt to apply these standards. Of the two, I think the second is the better choice.<sup>20</sup>

Therefore, the result is not to be based on a subjective personal opinion but rather on objective standards of the contemporary community. But the concept of contemporary community standards has proved to be very elusive. In what remains to this day probably the leading judgment on the community standards test, Mr. Justice Freedman's dissent in *R. v. Dominion News & Gifts (1962) Ltd.*,<sup>21</sup> it was said that such standards:

are not set by those of lowest taste or interest. Nor are they set exclusively by those of rigid, austere, conservative, or puritan taste and habit of mind. Something approaching a general average of community thinking and feeling has to be discovered.<sup>22</sup>



In that judgment Mr. Justice Freedman also held that the “community” whose standards are involved in this country is the entire Canadian community, not simply the local community where the material has been found or where the prosecution takes place.<sup>23</sup>

Finally, Mr. Justice Freedman held that, in giving effect to section 159(8), the courts had to be sensitive to the fact that community standards were subject to the evolution of ideas and values.<sup>24</sup>

It must be remembered that the standards are of community *tolerance* as distinct from community *preference*. The court must decide whether, by contemporary Canadian community standards, the material is tolerable in the sense that the general average of community thinking would have no objection to the material being read or seen by those members of the community who may wish to read or see it. The question is not whether the material is an affront to personal standards, but whether the standards of the community would tolerate the publication being viewed.<sup>25</sup>

In determining the standards of tolerance, reference is made to several different factors, including artistic or literary merit, the purpose for which the material is being viewed or read and the context in which it is being viewed or read. A higher level of tolerance is assigned to material that possesses artistic or literary merit,<sup>26</sup> or is to be used for scientific or educational purposes.<sup>27</sup> There is also greater tolerance for material that is restricted to adults, or to a particular segment of the community, such as writers or artists, than there is for material that is generally available or publicly displayed.<sup>28</sup>

In assessing the purpose or the value of the material, the work is to be taken as a whole, and it is not appropriate to isolate for analysis only those parts which seem offensive. Some materials, however, especially magazines, may have no single theme and in these cases each page can be looked at more or less in isolation.<sup>29</sup>

If the community standards of tolerance test can be formulated with reasonable precision, it is still notoriously difficult to apply. His Honour Judge Borins of the County Court of Ontario had this to say in *R. v. Doug Rankine Co.*:

[It] is a very difficult judgment to make in a community of 24,000,000 people who inhabit the second largest country in the world consisting of 3,831,012 square miles. No doubt very different levels of tolerance exist in small communities such as Goose Bay in Labrador, Dawson City in the Yukon and Nobleton in Ontario, and the large metropolitan centres of Montréal, Toronto and Vancouver. As well, Canada is a pluralistic society and different parts of that society will have different points of view. Yet it remains the task of the trier of fact, who is assumed to have his finger on the ‘pornographic pulse’ of the nation, to assess objectively whether or not the contemporary Canadian community will tolerate ... [the material] before the court.<sup>30</sup>

One of the reasons the test is so difficult to apply is that there is no onus on the Crown to prove the community standards of tolerance and in many

cases the court must determine the issue without the aid of evidence. Moreover, even when evidence of community standards is admitted, the judge is free to reject it and apply what, in the light of his own experience, he regards as the contemporary standards of the Canadian community.<sup>31</sup>

Although expert evidence on community standards is admissible, the weight given to it varies markedly from case to case and this variation cannot be attributed even primarily to the differing expertise of the witnesses. In general, the greatest weight is given to the evidence of witnesses such as provincial film censors, who are engaged full time in the task of judging community standards.<sup>32</sup> However, in a number of cases the evidence of these experts has been dismissed virtually without comment.<sup>33</sup> Other courts have given considerable weight to the testimony of such experts as city aldermen<sup>34</sup> and professors of health, education and psychology.<sup>35</sup>

There is simply no consistency in the cases as to who qualifies as a reliable expert on community standards, and what weight should be given to their evidence.

In addition to expert evidence, the courts have also considered various other kinds of evidence regarding community standards such as the actual rulings of provincial censor boards and Canada Customs officials,<sup>36</sup> examples of other material which is generally available in the community,<sup>37</sup> and surveys of public opinion.<sup>38</sup> Unfortunately, it is not clear precisely how much weight has actually been given to this evidence in cases where it has been considered.

Given the difficulties involved in the application of the community standards test, it is not surprising that there has not been any real consistency of results. There are, of course, a few things which everyone appears to agree cannot be tolerated. For example, the courts seem to agree that material which portrays incest,<sup>39</sup> juveniles engaged in sex,<sup>40</sup> or acts of severe cruelty or violence in combination with sex,<sup>41</sup> exceeds community standards, at least unless the material has significant artistic merit or a philosophical purpose.<sup>42</sup>

There now appears to be growing support, as well, for the proposition that material that "degrades" or "dehumanizes" one or more of the participants in the sexual activity that is portrayed, exceeds community standards of tolerance. For example, in *R. v. Doug Rankine Co.*, Judge Borins stated:

films which consist substantially or partially of scenes which portray violence and cruelty in conjunction with sex, particularly where the performance of indignities degrade and dehumanize the people upon whom they are performed, exceed the level of community tolerance.<sup>43</sup>

This view was taken a step further in the recent judgments in *R. v. Ramsingh*<sup>44</sup> and *R. v. Wagner*.<sup>45</sup> In both of these cases, the judges held that material that "degraded" or "dehumanized" any of the participants would exceed community standards even in the absence of cruelty or violence.

It is apparent, however, that terms like "degrading" and "dehumanizing" are themselves extremely vague. Even if the proposition that "degrading" or



“dehumanizing” material was obscene were to take firm hold in Canadian law, one would still expect to find conflicting decisions.

The differences of opinion in this area are particularly apparent in cases involving material containing nothing more than explicit sex. According to the judges in the three cases just cited, material of this kind should be held not to exceed community standards of tolerance. As Judge Borins put it in the *Rankine* case,

Contemporary community standards would tolerate the distribution of films which consist substantially of scenes of people engaged in sexual intercourse, ... scenes of group sex, lesbianism, fellatio, cunnilingus and oral sex.<sup>46</sup>

In *Re Luscher*, however, the judge found that a magazine “concerned with the sexual activity of a man and a woman from foreplay to orgasm” exceeded community standards even though the actions portrayed were “in no way unnatural or unlawful and, indeed ... are a common part of the lives of Canadian men and women”.<sup>47</sup> And in a New Brunswick case, the trial judge found that community standards were exceeded by magazines which he described as follows:

The magazines are most explicit and depict sexual conduct, not merely nudity. The conduct shows lesbianism, homosexuality and heterosexuality. Male and female genitalia are explicitly photographed.... There were no pictures depicting sex and ‘the subject crime, horror, cruelty or violence’ as set out in s. 159(8). The pictures appear to be of adults consenting to the sexual acts of other(s).<sup>48</sup>

Another striking example of inconsistency is found in two cases involving sex aids. A Nova Scotia County Court judge held in one case that lubricants, devices, prosthetics and novelties sold by a sex shop exceeded community standards of tolerance. In contrast, an Ontario County Court judge only three years before had concluded that similar products were not only tolerable, but in the public interest.<sup>49</sup>

The application of the community standards test has also produced inconsistent results in cases involving live performances. Some judges have found that the community standards of tolerance are exceeded when the whole of a person’s body is exposed.<sup>50</sup> Others have found that complete exposure unaccompanied by suggestive touching, expressions or gyrations does not exceed community standards,<sup>51</sup> but that when the performance does include suggestive touching and gestures, it does exceed community standards.<sup>52</sup> Still others have found that the performance of a completely nude couple engaged in simulated sexual acts does not exceed community standards.<sup>53</sup>

Taking everything together, it is not difficult to agree with one judge who observed recently that:

The lack of unanimity in the decisions of the courts in obscenity cases suggests that the Canadian contemporary community standard may very well be a very elusive, not readily discernible, and ill defined standard.<sup>54</sup>



We turn now to a consideration of the specific offences contained in the *Criminal Code*. For convenience, we have organized these offences under two headings, *Pornographic Materials* and *Pornographic Performances*.

## 2. Pornographic Materials

### 2.1 Section 159(1)(a) and (2)(a)

#### —Publishing, Distributing and Selling

159. (1) Every one commits an offence who

(a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever....

(2) Every one commits an offence who knowingly, without lawful justification or excuse,

(a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatsoever....

(6) Where an accused is charged with an offence under subsection (1) the fact that the accused was ignorant of the nature or presence of the matter, picture, model, phonograph record, ... or other thing by means of or in relation to which the offence was committed is not a defence to the charge.

These two offences, which are the major offences in this area, distinguish between two classes of persons, those who *produce or distribute* obscene material and those who *sell* obscene material. It is necessary for the Crown to prove that the accused actually knew the material was obscene in order to convict him of *selling* it. Proof of actual knowledge is unnecessary in order to convict someone for *producing or distributing* the material.

This important distinction is reinforced by subsection (6) which records that ignorance of the nature or presence of the obscene material is no defence to a charge under subsection (1) of producing or distributing the material. By implication, ignorance of such matters is a defence to a charge under subsection (2) of selling the material.

In general, it appears that section 159(1)(a) applies to the manufacture and wholesale distribution of obscene materials while section 159(2)(a) applies to retail sales.<sup>55</sup> This is consistent with what the courts consider to have been the purpose in making a distinction between the seller and the distributor. It is assumed that manufacturers have knowledge of the product they create and that distributors can and should know what they are wholesaling to retailers. It has been argued that the retail seller cannot reasonably be expected to know the actual contents of the variety of materials he has for sale.<sup>56</sup>

It has followed from this reasoning that a retailer who handles primarily obscene materials and not simply a "scattered few" may properly be classified as a distributor and charged under section 159(1)(a).<sup>57</sup>

It should be noted, however, that the courts have found that the two provisions are not mutually exclusive, and that a person who sells may also be a person who distributes and vice versa. The Ontario Court of Appeal has held that, "if a person has in his possession obscene matter for the purpose of distribution, [it does not matter] whether the means of distribution be sale, consignment for sale, free distribution or otherwise".<sup>58</sup>

It is of current interest to note that *rentals* have been held to be a form of distribution or circulation and not of sale. Hence video cassette rentals would appear to fall under section 159(1)(a).<sup>59</sup>

By contrast, the presentation of films alleged to be obscene has traditionally led to a charge under either section 159(2)(a) (exposing to public view) or section 163 (presenting an obscene performance or representation).

As a rule, it is incumbent on the Crown in criminal cases to prove knowledge or *mens rea* in order to obtain a conviction. That requirement can, however, be expressly excluded. By virtue of section 159(6), such an exclusion is contained in section 159(1)(a) for those charged with the manufacture or distribution of obscene material. In all of the other sections of the *Code* governing obscene materials, however, the Crown must prove that the accused knew the nature and content of the obscene representation.

This does not mean that the Crown must prove that the accused possessed the legal knowledge that the representation was obscene: that would turn the accused into the judge of his own guilt. It is sufficient if he is proved to have known, or to have been wilfully blind to, the subject matter of the representation.<sup>60</sup>

Furthermore, it is not incumbent on the Crown to show that the accused had actually viewed the material. It is sufficient to show that the accused knew the general nature of the material, that is, that he knew that the dominant characteristic of the material was the exploitation of sex. This knowledge may be inferred from all of the evidence. For example, evidence of the circumstances under which the material was displayed, or evidence that the accused had been warned about the nature of the material, may be sufficient to prove knowledge.<sup>61</sup>

However, where the accused has not actually viewed that material, it is impossible to state precisely what evidence would constitute sufficient proof of knowledge. For example, it has been held that where the accused could not read English, the mere fact that the police had on one occasion seized a large number of books under section 160 on the ground that they believed them to be obscene, and on a second occasion warned the accused that some of his books may be obscene, was insufficient to prove that the accused knew or was wilfully blind to the nature of yet another book in his store.<sup>62</sup> Similarly it has been held that where the accused had not read the book, the fact that he displayed it under a sign "Banned in Michigan" and beside a newspaper clipping with the headline "O'Hara's Book Naughty", was insufficient to prove knowledge or wilful blindness.<sup>63</sup>



It appears, therefore, that in those cases in which the accused has not actually viewed the material, the burden on the Crown to adduce sufficient evidence to prove knowledge is not easily satisfied.

For there to be an offence under section 159(2)(a), in addition to requiring proof of knowledge the relevant act must be done "without lawful justification or excuse". Where the Crown proceeds summarily, the burden of proof has been held (somewhat surprisingly) to rest on the accused to prove by a preponderance of evidence that he had a lawful excuse.<sup>64</sup> When the Crown proceeds by way of indictment, it is clear that the onus rests upon the Crown to prove beyond a reasonable doubt the *absence* of a lawful excuse. However, where the facts do not disclose the lawful excuse, and the accused fails to raise the issue and at least adduce some evidence, the trial judge is entitled to infer that there is no lawful excuse. The Crown is not obliged to canvass every conceivable justification that could be advanced on behalf of the accused.<sup>65</sup>

It is not clear, however, what constitutes a "lawful justification or excuse". For example, the case law at the present time is unclear as to whether or not approval by provincial censorship authorities will suffice. In *R. v. McFall*,<sup>66</sup> it was held that such approval did not provide the lawful excuse. The issue has been argued in the Supreme Court of Canada very recently in *R. v. Town Cinema Theatres (1975) Ltd.*<sup>67</sup> and judgment is still reserved.

A further example of the present confusion arose in an Ontario case where the accused's honest belief that the materials were not obscene did not constitute a lawful excuse, even though the belief was based on the knowledge that the obscenity charges against the same poster had been dismissed in another Canadian jurisdiction.<sup>68</sup>

While section 159 prohibits the possession of obscene material for the purpose of publication, distribution, circulation, sale or exposing to public view, it does not prohibit the possession of obscene material for private use. While *private* possession is not prohibited, the situation becomes less clear if a person shows his obscene materials to others. In *R. v. Rioux*,<sup>69</sup> the accused owned some obscene films which he showed on three occasions to a group of some ten persons. The Supreme Court of Canada acquitted the accused, finding that showing obscene pictures to a friend or projecting an obscene film in one's own home is not in itself a crime. It was held to constitute neither circulation (under section 159(1)(a)) nor exposure to public view (under section 159(2)(a)) of obscene materials.

Similarly, if obscene films are shown in a community hall exclusively to invited friends and relatives, the situation is tantamount to a showing to a private gathering in one's own home and is not prohibited by section 159.<sup>70</sup>

However, if only a few people, who are neither friends nor invited guests of the accused, pay to attend a showing of obscene films at what is otherwise a private party, it ceases to be a private showing and is prohibited by section 159.<sup>71</sup>



While it is not illegal to possess obscene material for private use, it may be illegal to *make* obscene material even for exclusively private use. In *Re Hawkshaw and the Queen*,<sup>72</sup> the accused submitted to a developing laboratory a role of film containing a picture of four persons, one of whom was performing fellatio on a 17 year-old boy. Although the Ontario Court of Appeal accepted that the accused intended only to use the photograph for private viewing, it found that the meaning of section 159(1)(a) was clear:

Parliament intended it to be an offence to make or to print an obscene picture, even though it might not be made for the purpose of publication or was not made known to the public.<sup>73</sup>

Accordingly, the accused was committed to stand trial for the offence. The case is presently on appeal to the Supreme Court of Canada.

It is apparent from this review of sections 159(1)(a) and 159(2)(a) that they have given rise to a number of problems. First, there is the fact that the offences overlap with each other. Given the different *mens rea* (guilty intent) requirements of the two offences, this is a problem of some significance. Second, there is the problem of the inconsistent treatment of videos and films, with the former falling under section 159(1)(a) and the latter falling under section 159(2)(a). This, too, is a serious problem, and for the same reason. Third, there is the difficulty in construing and applying the phrase “without lawful justification or excuse” in section 159(2)(a). Any proposals for reform in this area would have to take these problems into account.

## 2.2 Other Section 159 Offences

(2) Every one commits an offence who knowingly, without lawful justification or excuse,

- (b) publicly exhibits a disgusting object or an indecent show,
- (c) offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage, or
- (d) advertises or publishes an advertisement of any means, instructions, medicine, drugs or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

It is interesting to note that, until 1969, it was also an offence under section 159(2)(c) to advertise articles “intended or represented as a method of preventing conception”.

None of these offences appears to be of much importance nowadays. One of the very few reported cases to consider section 159(2)(b) was *R. v. Stewart*,<sup>74</sup> in which the accused had been charged with exhibiting a button with the phrase “Fuck Iron” on it. The court concluded that “disgusting” meant “turning the stomach” or “giving rise to a strong distaste or repugnance” and acquitted the accused.

The dearth of case law on section 159(2)(b) makes it difficult to know whether this provision could be used to control public displays of pornographic magazines. One suspects that the use of the words “object” and “show” would make this difficult. And it is by no means clear that the kinds of displays that people object to would be caught by the term “disgusting”.

Neither section 159(2)(c) nor section 159(2)(d) has given rise to any reported cases, at least in its current form. One wonders, in fact, why they continue to exist, particularly section 159(2)(d).

## 2.3 Section 159(3)(4) and (5) — The Public Good Defence

159. (3) No person shall be convicted of an offence under this section if he establishes that the public good was served by the acts that are alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good.

(4) For the purposes of this section it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

(5) For the purposes of this section the motives of an accused are irrelevant.

Even if the facts would support a conviction under section 159, the accused may invoke section 159(3) and avoid that conviction if he can establish that the acts in question served “the public good” and “did not extend beyond what served the public good”. But, as one commentator has noted, this defence is somewhat paradoxical, at least in the context of sections 159(1)(a) and 159(2)(a):

How can obscenity ever be in the public interest? Obviously something is wrong. Either the public has a perverted sense of what is good for it or the definition of what constitutes obscenity is perverted.<sup>75</sup>

The paradoxical nature of the section 159(3) defence is reflected in the fact that it is rarely invoked; it seems clear that very few representations found to be obscene by modern standards can make any pretence to serving “the public good”.

Furthermore, the meaning of the defence is exceedingly obscure. Section 159(5) provides that “the motives of an accused are irrelevant”, but that tells us very little. What judicial guidance there is can be found in the decision of Mr. Justice Laidlaw of the Ontario Court of Appeal in *R. v. American News Ltd.* where he states:

Again, what is included in the words ‘public good’? Surely it does not mean benefit or advantage to the public of every conceivable kind. I suggest that the limitation of those words ... [is] that which is ‘necessary’ or advantageous to religion, or morality, the pursuit of science, literature or art, or other objects of general interest. Without such limitation or description the defence is of such a vague, indefinite character as to be almost impracticable both in theory and in practice.<sup>76</sup>



However, a representation does not serve the public good merely because it possesses literary, artistic, or scientific merit. In *R. v. Cameron*,<sup>77</sup> the defence argued that a collection of drawings found to be obscene nevertheless possessed substantial artistic merit and, therefore, served the public good by assisting students of art and educating the public in the appreciation of art. While the Ontario Court of Appeal accepted the expert evidence that the pictures possessed some artistic merit, it was not prepared to find that they served “the public good”. The court could see no reason why:

it is either necessary or in the service of the public good so far as the teaching of art is concerned or the education of the public, unduly to exploit the theme of sex as a dominant characteristic in the portrayal of the human figure or figures.<sup>78</sup>

If this interpretation of section 159(3) is correct, it would seem that, regardless of the degree of artistic merit, no obscene picture can serve the public good.

In *R. v. Delorme*,<sup>79</sup> the Québec Court of Appeal similarly rejected the defence of public good after finding the book *Histoire d’Or* to be obscene. The court accepted the expert testimony that the book possessed literary and scientific value. However, the court reasoned that this value could only serve to benefit psychologists and sexologists and that the distribution of the book was not limited to these individuals. It was distributed to members of the general public who, according to the court, would be incapable of discussing the symbolic and psychological meaning of the book. Thus, despite its scientific and literary value, it could not be said to serve the public good. Of course, had the distribution of the book been limited to sexologists and psychologists, there would likely have been a finding that the book was not obscene and hence there would have been no need to consider section 159(3).

The only reported case in which the defence of public good has been successful is *R. v. Sutherland, Amitay and Bowie*.<sup>80</sup> In that case the court held that “it serves the public good to make available to those persons that so desire aids so that they may enjoy or further enjoy legitimate sexual acts and sexual harmony”.<sup>81</sup> However, it should be noted that the finding on this point was unnecessary as the judge had already found that the sexual aids and devices were not obscene.

It would appear, therefore, that the section 159(3) defence of public good is of little importance. Its meaning is extremely obscure and with the modern view of obscenity it is unlikely that any material found to be obscene could be said to serve the public good.

## 2.4 Section 160 — Warrant of Seizure

160. (1) A judge who is satisfied by information upon oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is obscene ... shall issue a warrant under his hand authorizing seizure of the copies.



(2) Within seven days of the issue of the warrant, the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

(3) The owner and the author of the matter seized and alleged to be obscene ... may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the said matter.

(4) If the court is satisfied that the publication is obscene ... it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

(5) If the court is not satisfied that the publication is obscene ... it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.

(6) An appeal lies from an order made under subsection (4) or (5) by any person who appeared in the proceedings

- (a) on any ground of appeal that involves a question of law alone,
- (b) on any ground of appeal that involves a question of fact alone, or
- (c) on any ground of appeal that involves a question of mixed law and fact,

as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XVIII and sections 601 to 624 apply *mutatis mutandis* (completely and without exception).

(7) Where an order has been made under this section by a judge in a province with respect to one or more copies of a publication, no proceedings shall be instituted or contained in that province under section 159 with respect to those or other copies of the same publication without the consent of the Attorney General.

(8) In this section  
“court” means

- (a) in the Province of Quebec, the provincial court, the court of the sessions of the peace, the municipal court of Montreal and the municipal court of Quebec;
- (a.1) in the Provinces of New Brunswick, Alberta and Saskatchewan, the Court of Queen’s Bench;
- (b) in the Province of Prince Edward Island, the Supreme Court; or
- (c) in any other province, a county or district court.

“judge” means a judge of a court.

This important section permits proceedings to be taken against material without laying charges against anyone. It provides for a two-stage procedure. The first stage involves an application which, if successful, results in a warrant being issued to seize the material in question. It is to be noted that, in making the application, the person swearing the information must state that there are reasonable grounds for believing that the material in question is being kept for sale or distribution. It is not enough simply to state that there are reasonable grounds for believing that the material is obscene. It is clear, therefore, that section 160 is aimed at commercial dealings in obscene material.

The second stage involves a summons being issued to the occupier of the premises from which the goods were seized. The occupier as well as the owner and the author of the material are entitled to appear in court and be heard on the question of whether the seized material is obscene and, therefore, to be forfeited to the Crown.

While subsection 2 states that the occupier must “show cause” at the second stage hearing, it has been decided that the onus is on the Crown to prove obscenity (as defined in section 159(8)) beyond a reasonable doubt.<sup>82</sup> It is also clear that no sanction can be imposed personally upon the occupier if he fails to attend the second stage hearing.<sup>83</sup> In order to reduce the possibility of double jeopardy, subsection (7) records that once an order is made declaring the material to be obscene and forfeited to the Crown, no proceedings under section 159 against an individual can be instituted or continued with respect to the same publication.

A review of the cases shows that in the 1960s it was commonplace for the Crown to proceed against material under section 160. So far as we have been able to tell, the section is virtually in complete disuse at the moment. The reasons we have been given by some law enforcement officials are that their resources are limited and they can, therefore, contemplate proceeding against only the “worst” of the material and that in these cases, proceedings against the individual distributors or sellers seem more appropriate and more likely to deter others than proceeding against the material itself. We have also been told that the section creates administrative problems resulting from storage and supervision of the seized material. There have been recent judicial suggestions that the section be better utilized by the authorities.<sup>84</sup> We will consider these suggestions when we come to discuss proposals for reform.

Although the point does not appear to have been argued, some courts appear to have accepted that the section can be used by a private citizen seeking to control the commercial exploitation of obscene material. There is certainly nothing in the language of the section to suggest that a private citizen lacks standing to come to court seeking that a warrant be issued in what we have described as the first stage proceeding. If the judge hearing the private citizen’s application issues a warrant, it is uncertain whether any Attorney General would be entitled to usurp the private citizen’s initiative by staying the proceedings. So far as we have been able to tell, the point has not yet arisen.

## 2.5 Section 161 — Tied Sales

161. Every one commits an offence who refuses to sell or supply to any other person copies of any publication for the reason only that such other person refuses to purchase or acquire from him copies of any other publication that such other person is apprehensive may be obscene....

This section came into the *Code* in 1959, at the same time that section 159(8) was introduced. At our public hearings we were told about complaints by retailers of magazines and periodicals that the very practice prohibited by

the section was in fact occurring. However, we received no such complaint directly from a retailer. We have been unable to discover any reported cases on the section and are unaware of any recent prosecutions.

## 2.6 Section 162 — Restriction of Publication of Reports of Judicial Proceedings

162. (1) A proprietor, editor, master printer or publisher commits an offence who prints or publishes

- (a) in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details, being matter or details that, if published, are calculated to injure public morals;
- (b) in relation to any judicial proceedings for dissolution of marriage, nullity of marriage, judicial separation or restitution of conjugal rights, any particulars other than
  - (i) the names, addresses and occupations of the parties and witnesses,
  - (ii) a concise statement of the charges, defences and countercharges in support of which evidence has been given,
  - (iii) submissions on a point of law arising in the course of the proceedings, and the decision of the court in connection therewith, and
  - (iv) the summoning up of the judge, the finding of the jury and the judgment of the court and the observations that are made by the judge in giving judgment.

(2) Nothing in paragraph (1)(b) affects the operation of paragraph (1)(a).

(3) No proceedings for an offence under this section shall be commenced without the consent of the Attorney General.

(4) This section does not apply to the person who

- (a) prints or publishes any matter for use in connection with any judicial proceedings or communicates it to persons who are concerned in the proceedings;
- (b) prints or publishes a notice or report pursuant to directions of a court; or
- (c) prints or publishes any matter
  - (i) in a volume or part of a *bona fide* series of law reports that does not form part of any other publication and consists solely of reports of proceedings in courts of law, or
  - (ii) in a publication of a technical character that is *bona fide* intended for circulation among members of the legal or medical professions.

This rather curious provision was originally enacted in 1938,<sup>85</sup> carried over with some changes into the 1953-54 *Code*,<sup>86</sup> and reproduced verbatim in the present *Code* renumbered as section 162. There appear to have been no cases decided under section 162 or its predecessors.<sup>87</sup>

No discussion accompanied the enactment of the 1938 provisions. In the House of Commons, all that was said was that the section:



... is a reproduction of the English law with respect to the publication of details and reports of judicial proceedings which may be calculated to injure public morals.<sup>88</sup>

In the Senate, the only comments were that the section was similar to the British provisions, that it was a “padlock law” and that it was directed against “yellow journalism”.<sup>89</sup>

In an attempt to find out precisely what section 162 is aimed at, we examined the origins of the parent English legislation. The *British Judicial Proceedings (Regulation of Reports) Act, 1926*<sup>90</sup> was introduced in the British Parliament in four consecutive sessions, beginning in 1923. Each time there was debate.<sup>91</sup>

The 1926 debates of the House of Commons are particularly informative.<sup>92</sup> It was noted that concern over the publication of “objectionable” reports had been voiced at an early date by Queen Victoria herself:

On 26th December 1859, her late Majesty Queen Victoria wrote as follows to Lord Chancellor Campbell:

The Queen wishes to ask the Lord Chancellor whether no steps can be taken to prevent the present publication of proceedings before the new Divorce Court. These cases, which must necessarily increase when the new law becomes more and more known, fill now almost daily a large portion of the newspapers, and are of so scandalous a character that it makes it almost impossible for a paper to be trusted in the hands of a young lady or boy.<sup>93</sup>

The Queen’s concern was evidently shared by the 1926 Parliament. The legislation was meant to be applied to the suggestive sexual details likely to come out in divorce proceedings. Those details, it was felt, would be published by some journals in order to increase their circulation. It was thought that such publication would lead to a deterioration of public morals. One Parliamentarian said:

There are, however, certain journals which it is needless to specify who deliberately exploit for gain, reports of judicial proceedings of an unsavoury character. It is a horrible traffic. One can scarcely imagine a more horrible traffic.<sup>94</sup>

The objectionable reports were said to be constituted by “... a mass of detail, more suggestive than actually indecent ....”<sup>95</sup>

There was extensive debate on the merits of the proposed legislation, especially regarding the conflicting interests of freedom of the press and protection of public morals.<sup>96</sup> One particularly interesting argument *against* the legislation was that the prospect of publication of the intimate details of one’s sexual misconduct would serve as a deterrent to the kind of behaviour that could result in divorce proceedings.<sup>97</sup> To that it was answered that the fear of publication would probably not deter anyone.<sup>98</sup>

The *Act* was said to be based upon previous legislation<sup>99</sup> and it was anticipated that the courts would employ the test in *R. v. Hicklin*<sup>100</sup> as to what was to be considered a threat to public morals.

We were able to find only one reported case under the British legislation. That is *Duchess of Argyll v. Duke of Argyll*.<sup>101</sup> However, the case is of only marginal interest; it deals with the rights of parties to a divorce proceeding to seek an injunction against the publishing of details of the proceeding.

## 2.7 Section 164 — Mailing Obscene Matter

164. Every one commits an offence who makes use of the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral or scurrilous, but this section does not apply to a person who makes use of the mails for the purpose of transmitting or delivering anything mentioned in subsection 162(4).

In the chapter of this Report dealing with Canada Post we discuss the interpretation that has been given by the courts to this section. It should be observed, however, that the words “indecent, immoral or scurrilous” are not defined in the *Code* or in any other Canadian statute.

## 3. Pornographic Performances

While there are a number of sections in the *Code* governing pornographic acts or performances,<sup>102</sup> sections 163 and 170 are the most important.

### 3.1 Section 163 — Immoral Theatrical Performance

163. (1) Every one commits an offence who, being the lessee, manager, agent or person in charge of a theatre, presents or gives or allows to be presented or given therein an immoral, indecent or obscene performance, entertainment or representation.

(2) Every one commits an offence who takes part or appears as an actor, performer, or assistant in any capacity, in an immoral, indecent or obscene performance, entertainment or representation in a theatre.

The term “theatre” is defined in section 138 of the *Code* as follows:

theatre includes any place that is open to the public where entertainments are given, whether or not any charge is made for admission.

The question of whether the definition of “obscene” in section 159(8) is to be imported into section 163 has been answered by the courts on the basis of the medium in question. In 1973 the British Columbia Court of Appeal in *R. v. Small*<sup>103</sup> decided that the definition in section 159(8) related only to books and did not apply to live theatrical performances. The majority of the court concluded that the word “obscene” should be given a meaning that amalgamates the dictionary meaning, the *Hicklin* test and the dissenting judgment of Mr. Justice Freedman in *R. v. Dominion News & Gifts (1962) Ltd.*<sup>104</sup>

However, the Court of Queen’s Bench in Alberta has held that the section 159(8) definition does apply when the entertainment is a movie and, therefore,

a “publication” within the meaning of that section.<sup>105</sup> The trial decision was affirmed by the Alberta Court of Appeal and, as we have already mentioned,<sup>106</sup> judgment has been reserved by the Supreme Court of Canada.

The section also raises the question of the appropriate meaning to be given to the words “immoral” and “indecent”, in the absence of a statutory definition.

The Supreme Court of Canada has held that simply because a performance is done in the nude does not make it “immoral” within the meaning of the section, and the fact that being nude in a public place is an offence under section 170 is irrelevant to a charge under section 163.<sup>107</sup>

In another case, decided in 1982, the Ontario Court of Appeal decided that the trial judge had been wrong in deciding that “ ‘immorality’ is of a lesser degree of seriousness than ‘indecent’ or ‘obscenity’ ”.<sup>108</sup> However, the court agreed with the trial judge that the test was one of community standards of tolerance and that the following factors should be taken into account in applying that test:

(1) the locale of the performance; (2) the forewarning of the public of the nature of the performance; (3) the condition of admission; and (4) the size and nature and the extent of the reception of the audience to the particular performance and to similar performances<sup>109</sup> ...;

The court also thought that the accused’s purpose in giving the performance should be considered.<sup>110</sup>

Inasmuch as leave to appeal this decision to the Supreme Court of Canada was refused, we can treat the test as being settled. What remains unclear is whether the test is precisely the same as the community standards test applied by the courts in interpreting section 159(8). Put another way, does the community standard of tolerance concerning “immorality” and “indecent” differ in any way from the community standard of tolerance with respect to “obscenity”?

### 3.2 Section 170 — Nudity

170. (1) Every one who, without lawful excuse,

(a) is nude in a public place, or

(b) is nude and exposed to public view while on private property, whether or not the property is his own,

is guilty of an offence punishable on summary conviction.

(2) For the purposes of this section a person is nude who is so clad as to offend against public decency or order.

(3) No proceedings shall be commenced under this section without the consent of the Attorney General.



The section raises at least three questions immediately. First, can a charge be brought under it in respect of a theatrical performance, notwithstanding the separate offence created by section 163(2)?

Second, is there a difference between being nude and being naked? Subsection (2) indicates that whether a person is nude depends on whether he or she is "so clad as to offend against public decency or order". For a while there was some confusion as to whether a person who had no clothes on in a public place could commit the offence simply by being naked.

Third, what will constitute a "lawful excuse" under the section?

All three questions were addressed by the Supreme Court of Canada in 1978 when the court unanimously decided in *R. v. Verrette*<sup>111</sup> that:

- (a) A charge may properly be brought under section 170 in theatrical performance cases notwithstanding the separate offence created by section 163(2) of appearing as a performer in an immoral, indecent, or obscene performance in a theatre.
- (b) A dancer performing completely unclad in a public place contravenes section 170 in the absence of lawful excuse, and there is no additional requirement that the nudity offend against public decency or order. However, the performance of a dance in a public place by a dancer who is not completely unclothed contravenes section 170 only if the performer is so clad as to offend against public decency or order.
- (c) A "legitimate theatrical performance" or "escaping from a house on fire" or "running from a rapist", or "modelling in a lecture hall for art students" may constitute a lawful excuse for nudity.

There is also, of course, the question of what test is to be applied to cases of partial nudity. According to the Ontario Court of Appeal, this test is to be the same as that employed in cases arising under section 163.<sup>112</sup> In other words, the test of what offends "public decency" in subsection (2) is the community standard of tolerance for the actions of the accused in the particular circumstances of the performance.

Thus we are left with rather a curious situation. If the accused is completely nude in a public place without lawful excuse, and the Attorney General consents to proceedings under section 170, the accused will be convicted. However, if the accused is partially clad, there is no guarantee of conviction under section 170, since it must be shown that the partial nudity offends the community standard of tolerance. As might be expected, this unusual situation has led to rather unusual behaviour. "Exotic dancers", while sequentially exposing every part of their bodies, are careful always to retain some small piece of clothing so as to avoid being completely nude. As one would expect, this has given rise to much argument in the cases about what exactly constitutes complete nudity. Will any speck of clothing suffice, or must the coverage be reasonably substantial? In *R. v. McCutcheon*<sup>113</sup> the Quebec Court of Appeal held that an "exotic dancer" who wore a "thin transparent veil attached at the neck" was not completely nude. Similarly, in *R. v. Szunejko*,<sup>114</sup> an Ontario case, an "exotic dancer" wearing a see-through

negligee which was open in the front was found not to be completely nude. However, in *R. v. Diaz*,<sup>115</sup> another Ontario case, an “exotic dancer” wearing only a brassiere open at the front was found to be completely nude. The judge in that case reasoned that nudity should be determined by considering what parts of the body are exposed and what percentage of the body is exposed. He concluded that where all the private parts are exposed and, at the same time, 99.99% of the body, a person is completely nude.

## 4. Penalties

Under section 165, the Crown is empowered to commence proceedings either by indictment or summarily in the case of prosecutions under sections 159, 161, 162, 163 and 164. The Crown can only proceed summarily in the case of prosecutions under section 170.

An accused who is convicted on indictment is liable to imprisonment for two years. A fine may be imposed in lieu of or in addition to a term of imprisonment.<sup>116</sup> An accused who is convicted summarily is liable to imprisonment for six months. Again, a fine may be imposed in lieu of or in addition to a term of imprisonment. That fine cannot, however, exceed \$500.<sup>117</sup>

The Committee was unable to discover any reliable statistics on the relative frequency of the Crown proceeding by way of indictment rather than summarily in those cases where it had a choice. The Committee’s impression is, however, that most prosecutions are proceeded with summarily.

Reliable statistics on the punishments imposed in this area are also unavailable. Terms of imprisonment appear to be imposed very seldom, however. The usual punishment is a fine and, because of the preference of the Crown to proceed summarily, the fines tend to be very small. On occasion, however, a significant fine of several thousand dollars is imposed.

## 5. Past Proposals for Reform

Past proposals for the reform of the *Criminal Code* provisions in this area have come from many different sources and have taken many different forms. The proposals made by private individuals and organizations are discussed elsewhere in this report and will not be examined here. The focus here is on the proposals that have been made by public officials and bodies. These proposals are found in bills introduced in the House of Commons but not passed, the Report on Pornography submitted to the House of Commons in 1978 by the Standing Committee on Justice and Legal Affairs, a paper published by the Law Reform Commission of Canada, and a suggestion emanating from the Bench.

The last decade has seen some forty bills introduced into the House of Commons on the matter of pornography. The majority of these proposed



amendments of one form or another to the *Criminal Code*. The only such bills that were enacted into law concerned the definition of the word “court” in section 160.<sup>118</sup> Of the others, all but four were private members’ bills. It is not surprising that these bills were not enacted into law, for it is an unusual occurrence when a private member succeeds in getting a bill through the House. One of the government-sponsored bills is currently before the House, so it may yet become law.<sup>119</sup> Why the other three government-sponsored bills were not enacted into law is unclear.<sup>120</sup> One presumes it was simply a matter of government priorities.

The general purpose of both the private members’ bills and those with government support has been to tighten the grip of the *Criminal Code* on pornography. A large number of the bills were designed to ensure that children were accorded better protection from pornography. These bills are discussed in the part of this report that deals with children and will not be examined here.

Other objectives reflected in these bills include increasing the penalties in this area,<sup>121</sup> ensuring that material in respect of which convictions are registered under provisions like sections 159 and 164 is forfeited to the Crown,<sup>122</sup> eliminating the use of opinion evidence on community standards,<sup>123</sup> and providing better protection against public displays of pornography.<sup>124</sup> As well, suggestions have been made for revisions to section 159(8).<sup>125</sup> Some of these suggestions reflect an American influence since they include quite detailed descriptions of the kinds of sexual activities that are not to be described or depicted.<sup>126</sup>

The most recent proposal with respect to section 159(8) is found in Bill C-19 of 1984.<sup>127</sup> An omnibus *Criminal Code* amendment bill sponsored by then Minister of Justice, Mr. Mark MacGuigan, it would have repealed the existing section 159(8) and replaced it with the following:

159 (8) For the purposes of this Act, any matter or thing is obscene where a dominant characteristic of the matter or thing is the undue exploitation of any one or more of the following subjects, namely, sex, violence, crime, horror or cruelty through degrading representations of a male or female person or in any other manner.

This provision differs from the existing section 159(8) in three important respects. First, it makes it clear that the definition applies to “any matter or thing” and not just to “any publication”. Given the decision of the Supreme Court of Canada in *R. v. Dechow*<sup>128</sup> regarding the status of the *Hicklin* test, such a clarification would likely have put that test to rest. In other words, had the revised version of section 159(8) contained in Bill C-19 become law, there would have been nothing left to which the *Hicklin* test could have been applied.

The second important change lies in the removal of the requirement contained in the existing section 159(8) that violence, crime, horror and cruelty be combined with sex in order for them to be considered obscene. This change would obviously have significantly broadened the scope of section 159(8).



The third change of note is the express reference to the notion of degradation. The amended provision would have made explicit what a number of the most recent section 159(8) decisions have held to be implicit,<sup>129</sup> namely, that “undue exploitation” can take the form of “degrading representations” of men or women. Whether it would have been held to have gone further than that and to have *required* that material that contained “degrading representations of a male or female person” be held to be obscene is unclear.

The only proposal in all these bills that would have *relaxed* the grip of the *Criminal Code* on pornography is found in the two most recent government-sponsored bills. That proposal was to make it necessary to obtain the consent of the provincial Attorney General before proceedings could be commenced under section 159 or section 163 in respect of films or videos that were being shown in accordance with provincial film review legislation. This amendment was obviously designed to provide at least some protection from prosecution to those who receive the approval of their provincial film classification board to show a particular film or video.

The Report on Pornography that was submitted to the House of Commons in 1978 by the Standing Committee on Justice and Legal Affairs<sup>130</sup> contained a total of eleven recommendations, six of which called for amendments to the *Criminal Code* and one of which called for new legislation at the provincial and municipal levels. The other four recommendations dealt with enforcement practices. The thrust of all these recommendations mirrored that of the proposals contained in the bills that we have just examined. They were all designed, in other words, to strengthen the law.

The underlying philosophy of the Report is reflected in the following passage:

The clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles.<sup>131</sup>

Insofar as the *Criminal Code* is concerned, this philosophy led first to a recommendation that section 159(8) be replaced by a new provision that would incorporate not only a revised general definition of obscene but also a special definition of obscene to deal with child pornography.<sup>132</sup> Insofar as the former is concerned, the language bears a close resemblance to that found in Bill C-19. The only difference is that the concept of degradation constitutes a separate test, that of “undue degradation of the human person”, rather than being part and parcel of the “undue exploitation” test. The actual language of the general definition was as follows:

159 (8) For the purposes of this Act, a matter or thing shall be deemed to be obscene where ... a dominant characteristic of the matter or thing is the

undue exploitation of sex, crime, horror, cruelty or violence, or the undue degradation of the human person....<sup>133</sup>

From this recommendation, the Report proceeded to a number of subsidiary recommendations about prosecutions under section 159. It suggested that opinion evidence should not be admissible on the question of community standards<sup>134</sup> and that the Attorney General should be able to override an accused's election regarding mode of trial and request a trial by jury.<sup>135</sup> It also recommended a substantial increase in the penalties for section 159 and for sections 161, 162, 163 and 164.<sup>136</sup> And, finally, it recommended that materials in respect of which a conviction is obtained under sections 159 and 164 be forfeited to the Crown.<sup>137</sup>

The Report contained a separate recommendation to deal with the procurement of children to participate in the production of sexually explicit materials. This recommendation is discussed in the chapters on children.

One final recommendation of note deals with section 160 of the *Code*. The Report suggested that, where a charge was laid under section 159, section 160 should be used to stop the further dissemination of the material in question while the prosecution under section 159 proceeded.<sup>138</sup>

Although none of the recommendations in the Report relating to the *Criminal Code* has given rise to any amendments, some of them did find their way into two of the government-sponsored bills mentioned above. Bill C-21, which was introduced into the House of Commons in November of 1978, borrowed heavily from the Report in respect of its proposals regarding both section 159(8) and increased penalties for offences under section 159. And the slightly revised version of section 159(8) that was proposed in Bill C-19 of 1984 obviously had its roots in the Report's recommendation regarding that provision.

The Law Reform Commission of Canada has published two papers on obscenity and the criminal law. The first of these papers, which appeared in 1972, was authored by Professor Richard Fox and the views expressed in it are his rather than the Commission's.<sup>139</sup> For that reason, it will not be discussed here. (It should be noted, however, that the paper contains a very thorough analysis of the law in Canada as of 1972 and is therefore a very useful research tool).

The second paper published by the Commission appeared in 1975. Entitled *Limits of Criminal Law—Obscenity: A Test Case*,<sup>140</sup> the paper explores the question of the proper scope of criminal law, with obscenity being used as a test case. It is highly theoretical and contains very little discussion of the relevant *Code* provisions. Nevertheless, it does suggest that, in the opinion of the Commission, at least some of those provisions should be removed from the *Code*. It was appropriate, the Commission said, for the criminal law to be used to proscribe what it called "public obscenity" and to protect children.<sup>141</sup> What it called "private obscenity", however, should remain untouched by the



criminal law (although it could be regulated in other ways).<sup>142</sup> Thus, adults should not be prevented by the criminal law from obtaining, and viewing or reading in the privacy of their own homes, obscene material. As the paper put it, “individuals should be free to choose their own lifestyle and society should be free to change”.<sup>143</sup> Moreover, according to the Commission, the costs to society of criminalizing “private obscenity”, including the loss of liberty and the financial costs, would outweigh the benefits.<sup>144</sup>

The final proposal for reform to be discussed here comes from the Bench. In his clear and thoughtful judgment in *R. v. Nicols*,<sup>145</sup> His Honour Judge Borins expressed the view that prosecutions under section 159 should not be sustained unless and until, as he put it, “a section 160 proceeding has placed a tract beyond the pale”.<sup>146</sup> In other words, before commencing proceedings under section 159, the Crown should be required to obtain a ruling under section 160 that the material in question is “obscene”. The reason for this, according to Judge Borins, lies in the vagueness of the definition of “obscene” in section 159(8). As he put it, “To condemn people to the stigma of a criminal conviction for violating standards they cannot understand, construe and apply is a serious thing to do in a nation which, by its recent *Charter of Rights*, has affirmed its dedication to fair trials and due process”.<sup>147</sup>

It is apparent from even this brief discussion that, while there is obviously a good deal of dissatisfaction with the current *Code* provisions in this area, the reasons for the dissatisfaction differ, as do the proposals for reform. It seems clear that those within government are of the view that the law must be broadened in scope and strengthened. The Law Reform Commission of Canada, on the other hand, has suggested that the reach of the *Criminal Code* should be cut back, perhaps even drastically. And His Honour Judge Borins is of the view that the use of the major Code provision in this area, section 159, should be restricted.



## Footnotes

- <sup>1</sup> S.C. 1892, c.29. The transmission through the post of anything of an "obscene, immoral, indecent, seditious, disloyal, scurrilous or libellous" character had previously been prohibited by s. 72(27) of the *Post Office Act*, S.C. 1875, c.7. This subsection was the antecedent of the present s. 164 of the *Criminal Code*.
- <sup>2</sup> (1868), 3 Q.B.D. 360.
- <sup>3</sup> *Ibid.*, at 371.
- <sup>4</sup> *R. v. American News* (1957), 118 C.C.C. 152 (Ont.C.A.) at 154, 157 and 161.
- <sup>5</sup> *Ibid.*, at 157-158, but see *R. v. Stroll* (1951), 100 C.C.C. 171 (Que. Ct. of Sessions), at 172 and *R. v. National News Co.* (1953), 106 C.C.C. 26 (Ont.C.A.).
- <sup>6</sup> *R. v. American News*, (1957) and *R. v. St. Claire* (1913), 21 C.C.C. 350 (Ont.C.A.) but see *Conway v. The King*, [1944] 2 D.L.R. 530 (Que.K.B.) and *R. v. Stroll* (1951).
- <sup>7</sup> S.C. 1959, c.41, s. 11.
- <sup>8</sup> W.H. Charles, "Obscene Literature and the Legal Process in Canada" (1966) 44 *Can. Bar Rev.* 243.
- <sup>9</sup> *R. v. Standard News Distributors Inc.* (1960), 34 C.R. 54 (Que.Mun.Ct.) and *R. v. Munster* (1960), 129 C.C.C. 277 (N.S.C.A.).
- <sup>10</sup> [1962] S.C.R. 681.
- <sup>11</sup> Judson, Abbott and Martland, JJ. for the majority and Kerwin C.J. in dissent.
- <sup>12</sup> Ritchie, J. for the majority and Fauteux, J. in dissent.
- <sup>13</sup> Cartwright, J. for the majority and Taschereau, J. in dissent.
- <sup>14</sup> Locke, J. in dissent.
- <sup>15</sup> The cases are collected in Robert E. Lutes, "Obscenity Law in Canada" (1974) 23 *Univ. N.B.L.J.* 30, at 36 and 37.
- <sup>16</sup> (1977), 76 D.L.R. (3d) 1. (S.C.C.)
- <sup>17</sup> *R. v. Brodie* (1962).
- <sup>18</sup> *R. v. Odeon Morton Theatres* (1974), 16 C.C.C. (2d) 185 (Man.C.A.).
- <sup>19</sup> *R. v. Doug Rankine Co.* (1983), 9 C.C.C. (3d) 53, (Ont.Co.Ct.).  
*R. v. Nicols* 27 Nov. 1984, unreported (Ont.Co.Ct.).  
*R. v. Wagner*, Jan. 1985, unreported (Alta.Q.B.).
- <sup>20</sup> *R. v. Brodie* (1962), at 716.
- <sup>21</sup> (1963) 2 C.C.C. 103. This judgment was adopted in its entirety by the Supreme Court of Canada on the later appeal of the case. See [1964] S.C.R. 251.
- <sup>22</sup> *Ibid.*, at 116.
- <sup>23</sup> *Ibid.*, at 117.
- <sup>24</sup> *Ibid.*, at 116-17.
- <sup>25</sup> *R. v. Benjamin News* (1978), 6 C.R. (3d) 281 (Que.C.A.) at 285.
- <sup>26</sup> *R. v. Odeon Morton Theatres Ltd.* (1974).  
*R. v. Towne Cinema Theatres (1975) Ltd.*, [1982] 1 W.W.R. 512 (Alta. Q.B.) Affirmed 12 May 1982, unreported (Alta.C.A.). S.C.C. reserved 28 Sept. 1983.
- <sup>27</sup> *U. of Manitoba v. Deputy Minister of Revenue Canada* (1983), 24 Man. R. (2d) 198 (Man.Co.Ct.).
- <sup>28</sup> *R. v. Sudbury News Services Ltd.* (1978), 39 C.C.C. (2d) 1 (Ont.C.A.) at 10.

- <sup>29</sup> *R. v. Penthouse* (1979), 96 D.L.R. (3d) 735 (Ont.C.A.) at 741.
- <sup>30</sup> *R. v. Doug Rankine Co.* (1983).
- <sup>31</sup> *R. v. Great West News* 1970, 4 C.C.C. 2d 307 (Man.C.A.) at 315.  
*R. v. Popert* (1981), 58 C.C.C. (2d) 505 (Ont.C.A.) at 508.
- <sup>32</sup> *R. v. Towne Cinema Theatres* (1974).
- <sup>33</sup> See, for example, *R. v. Daylight Theatre Co. Ltd.* (1973), 17 C.C.C. (2d) 451, (Sask.Dist.Ct.) at 455.
- <sup>34</sup> *R. v. Doug Rankine Co.* (1983), at 58.
- <sup>35</sup> *R. v. Minas Music Sales Ltd.* (1982), 109 A.P.R. 473 (N.S.Co.Ct.), *R. v. Wagner* (1985).
- <sup>36</sup> *R. v. Doug Rankine Co.* (1983).
- <sup>37</sup> *Re Luscher and Deputy Minister, Revenue Canada* (1983), 149 D.L.R. (3d) 243, (B.C.Co.Ct.) at 247.
- <sup>38</sup> *R. v. Prairie Schooner News Ltd.* (1970), 1 C.C.C. (2d) 251 (Man.C.A.).
- <sup>39</sup> *R. v. McDougall's Drug Store* (1982), 109 A.P.R. 463 (N.S.Co.Ct.).  
*R. v. Cinema International* (1981), 13 Man.R. (2d) 337 (Man.Co.Ct.), affirmed, 13 Man.R. (2d) 335 (Man.C.A.).
- <sup>40</sup> *R. v. Penthouse* (1979).
- <sup>41</sup> *R. v. Doug Rankine Co.* (1983).
- <sup>42</sup> *R. v. Towne Cinema Theatres* (1974).
- <sup>43</sup> *R. v. Doug Rankine Co.* (1983), at 70.
- <sup>44</sup> *R. v. Ramsingh* (1984), 14 C.C.C. (3d) 230 (Man.Q.B.).
- <sup>45</sup> *R. v. Wagner* (1985).
- <sup>46</sup> *R. v. Rankine Co.* (1983) at 70.
- <sup>47</sup> *Re Luscher and Deputy Minister, Revenue Canada* (1983), at 245.
- <sup>48</sup> *R. v. Saint John News Co. Ltd.* (1982), 124 A.P.R. 91 (N.B.Q.B.) at 100.
- <sup>49</sup> *R. v. Harris* (1977), 43 A.P.R. 104 (N.S.Co.Ct.) and *R. v. Sutherland, Amitay and Bowie* (1974), 18 C.C.C. (2d) 117 (Ont.Co.Ct.).
- <sup>50</sup> *R. v. Sidey* (1980), 52 C.C.C. (2d) 257 (Ont. C.A.).
- <sup>51</sup> *R. v. Szunejko* (1981), 61 C.C.C. (2d) 359 (Ont. Prov. Ct.) and *R. v. Gray* (1982), 65 C.C.C. (2d) 353 (Ont. H.C.).
- <sup>52</sup> *R. v. Campbell* (1974), 17 C.C.C. 2d 180 (Ont. Co. Ct.).
- <sup>53</sup> *R. v. Kleppe* (1977), 35 C.C.C. (2d) 168 (Ont. Prov. Ct.).
- <sup>54</sup> *R. v. Cinema International* (1981), at 342.
- <sup>55</sup> *R. v. Sudbury News Services Ltd.* (1978).
- <sup>56</sup> *R. v. Dorosz* (1971), 4 C.C.C. (2d) 203 (Ont.C.A.)  
*R. v. Menkin* (1957), 118 C.C.C. 306 (Ont.Prov.Ct.).
- <sup>57</sup> *Fraser et al v. The Queen*, [1967] 2 C.C.C. 43 (S.C.C.).  
*R. v. Yip Men* (1970), 4 C.C.C. 2d 185 (B.C.Co.Ct.).
- <sup>58</sup> *R. v. National News Co.* (1953), at 28.
- <sup>59</sup> *R. v. Video Moviestop* (1982), 101 A.P.R. 321 (Nfld.S.C.).
- <sup>60</sup> *R. v. Cameron*, [1966] 4 C.C.C. 273 (Ont.C.A.).
- <sup>61</sup> *R. v. McFall* (1975), 26 C.C.C. 181 (B.C.C.A.).
- <sup>62</sup> *R. v. Lee* (1971), 3 C.C.C. (2d) 306, (B.C.S.C.).
- <sup>63</sup> *R. v. Video Moviestop* (1982).
- <sup>64</sup> *R. v. Harris* (1977).
- <sup>65</sup> *R. v. McFall* (1975).
- <sup>66</sup> *Ibid.*
- <sup>67</sup> *R. v. Odeon Morton Theatres Ltd.* (1974).
- <sup>68</sup> *R. v. Kiverago* (1973) 11 C.C.C. (2d) 463, (Ont.C.A.).
- <sup>69</sup> (1970) 3 C.C.C. 2d 149 (S.C.C.).

- <sup>70</sup> *R. v. Harrison* (1973) 12 C.C.C. (2d) 26 (Alta.Prov.Ct.)
- <sup>71</sup> *R. v. Vigue* (1973) 13 C.C.C. (2d) 381 (B.C.Prov.Ct.).
- <sup>72</sup> (1982), 69 C.C.C. (2d) 503 (Ont.C.A.).
- <sup>73</sup> *Ibid.*, at 510.
- <sup>74</sup> (1980) 16 C.R. (3d) 87 (Ont.Prov.Ct.).
- <sup>75</sup> R.S. McKay, "The Hicklin Rule and Judicial Censorship" (1958), 36 *Can. Bar. Rev.* 1, at 8.
- <sup>76</sup> *R. v. American News* (1957), 4 at 166.
- <sup>77</sup> *R. v. Cameron* (1966).
- <sup>78</sup> *Ibid.*, at 289.
- <sup>79</sup> (1973) 15 C.C.C. (2d) 350 (Que.C.A.).
- <sup>80</sup> *R. v. Sutherland et al* (1974).
- <sup>81</sup> *Ibid.*, at p.124.
- <sup>82</sup> *R. v. Penthouse Magazine* (1977) 37 C.C.C. (2d) 376 (Ont.Co.Ct.).
- <sup>83</sup> *R. v. Benjamin News* (1978).
- <sup>84</sup> *R. v. Nicols* (1983).
- <sup>85</sup> *Criminal Code Amendment Act, 1938*, S.C. 1938, c. 44, s. 11
- <sup>86</sup> S.C. 1953-54, c. 51, s.151.
- <sup>87</sup> There is a Québec case that deals with the constitutional issue of whether a province can enact legislation dealing with the same subject matter as s. 162. See, *Hurrell v. Montréal*, [1963] Qué. P.R. 89 (S.C.).
- <sup>88</sup> Hansard 1938, p.4315 (H.C.).
- <sup>89</sup> Hansard 1938, p.576 (Sen.).
- <sup>90</sup> 16 & 17 Geo. 5, c. 61 (U.K.). Some of the Australian states also copied the English provision. See, e.g., *Judicial Proceedings Reports Act*, 1958, Stats. Victoria 1958, No. 6280. There do not appear to have been any cases decided pursuant to that legislation in the Australian jurisdictions.
- <sup>91</sup> 164 H.C. Deb. (U.K.) cols. 248-252, 2659 (1923); 165 H.C. Deb. (U.L.) col. 1155 (1923); 170 H.C. Deb. (U.K.) cols. 1193, 1886 (1924); 181 H.C. Deb. (U.K.) col. 1143 (1925); 183 H.C. Deb. (U.K.) cols. 575, 2053 (1925); 184 H.C. Deb. (U.K.) col. 1738 (1925); 62 H.C. Deb. (U.K.) cols. 130-159, 528-547, 680, 687 (1925); 188 H.C. Deb. col. 186 (1925); 191 H.C. Deb. (U.K.) col. 497 (1926); 194 H.C. Deb. (U.K.) cols. 733-815 (1926); 65 H.L. Deb. (U.K. cols. 1591-1611.
- <sup>92</sup> 194 H.C. Deb (U.K.)(1926).
- <sup>93</sup> *Ibid.*, col. 734.
- <sup>94</sup> *Ibid.*, col. 735.
- <sup>95</sup> *Ibid.*
- <sup>96</sup> *Ibid.*, cols. 733-814.
- <sup>97</sup> *Ibid.*, cols. 749-52.
- <sup>98</sup> *Ibid.*, col. 734.
- <sup>99</sup> For example, *The Law of Libel (Amendment) Act*, 1888, 51-52 Vic., c. 64, s. 3; *Indecent Advertisements Act*, 1889, 52-53 Vic., c. 18; *Obscene Publications Act*, 1857, 20-21 Vic., c. 83.
- <sup>100</sup> (1868), 3 Q.B.D. 360.
- <sup>101</sup> [1965] 1 All E.R. 611 (Ch.Div.).
- <sup>102</sup> Two other sections, s. 159(2)(b) and s. 171(1)(b), are relevant in this context, but neither appears to be of much significance. With respect to s. 159(2)(b), which deals with "indecent shows", see *Smith v. R.* (1963), 1 C.C.C. 395 (Man.Co.Ct.). With respect to s. 171(1)(b), which prohibits openly exposing an "indecent exhibition" in a public place, see *R. v. Boger* (1981), 61 C.C.C. (2d) 355 (Ont.Prov.Ct.).
- <sup>103</sup> [1973] 4 W.W.R. 563 (B.C.C.A.).
- <sup>104</sup> [1963] 2 C.C.C. 103.
- <sup>105</sup> *R. v. Towne Cinema Theatres (1975) Ltd.* (1975).
- <sup>106</sup> *Ibid.*



- <sup>107</sup> *R. v. Johnson* (1973), 13 C.C.C. (2d) 402 (S.C.C.).
- <sup>108</sup> *R. v. MacLean and MacLean No. 2*, (1982), 1 C.C.C. (3d) 412 (Ont. C.A.), at 416.
- <sup>109</sup> *Ibid.*, at 414-415.
- <sup>110</sup> *Ibid.*, at 415.
- <sup>111</sup> (1978), 40 C.C.C. (2d) 273 (S.C.C.).
- <sup>112</sup> *R. v. Giambalvo* (1982), 70 C.C.C. (2d) 324 (Ont. C.A.). *R. v. Gray* (1982).
- <sup>113</sup> (1977), 40 C.C.C. (2d) 555 (Que. C.A.).
- <sup>114</sup> *R. v. Szunejko* (1980).
- <sup>115</sup> *R. v. Diaz* (1981), 60 C.C.C. (2d) 39 (Ont. Prov. Ct.).
- <sup>116</sup> *Criminal Code*, s.646(1).
- <sup>117</sup> *Ibid.*, s.722(1).
- <sup>118</sup> S.C. 1974-75, c.48, s.25(1) and S.C. 1978-79, c.11, s.10(1).
- <sup>119</sup> Bill C-18, 1984, 1st Sess., 33rd Parl. (Minister of Justice).
- <sup>120</sup> The three government bills, all of which were omnibus *Criminal Code* amendment bills, were Bill C-21, 1978, 4th Sess., 30th Parl.; Bill C-53, 1981, 1st Sess., 32nd Parl.; and Bill C-19, 1984, 2nd Sess., 32nd Parl. Each was introduced by the Minister of Justice.
- <sup>121</sup> Bill C-434, 1978, 3rd Sess., 30th Parl. (Mr. Whiteway) and Bill C-21.
- <sup>122</sup> Bill C-206, 1977, 3rd Sess., 30th Parl. (Mr. Epp); Bill C-207, 1977, 3rd Sess., 30th Parl. (Mr. McGrath); Bill C-325, 1977, 3rd Sess., 30th Parl. (Mrs. Appolloni); Bill C-434; Bill C-21; Bill C-53. Bill C-206 has been tabled a total of four times, Bill C-207 a total of eleven times.
- <sup>123</sup> Bill C-434, *supra*, note 121.
- <sup>124</sup> Bill C-281, 1977, 3rd Sess., 30th Parl. (Mr. Whiteway); Bill C-325, 1977, 3rd Sess., 30th Parl. (Mrs. Appolloni); Bill C-411, 1977, 3rd Sess., 30th Parl. (Mr. Kaplan); The last of these bills has been tabled a total of four times.
- <sup>125</sup> Bill C-207; Bill C-434; Bill C-21, *supra*, note 119; and Bill C-673, 1983, 1st Sess., 32nd Parl. (Mr. Kilgour).
- <sup>126</sup> See in particular Bill C-673.
- <sup>127</sup> See note 120.
- <sup>128</sup> (1977), 76 D.L.R. (3d) 1. (S.C.C.).
- <sup>129</sup> See text accompanying notes 43, 44 and 45.
- <sup>130</sup> House of Commons, Standing Committee on Justice and Legal Affairs, Report on Pornography, Proceeding No. 18, 3rd Sess., 30th Parl., 1977-78 (McGuigan Report).
- <sup>131</sup> *Ibid.*, at 18-4.
- <sup>132</sup> *Ibid.*, at 18-6.
- <sup>133</sup> *Ibid.*
- <sup>134</sup> *Ibid.*, at 18-9.
- <sup>135</sup> *Ibid.*, at 18-8 and 18-9.
- <sup>136</sup> *Ibid.*, at 18-10 and 18-11.
- <sup>137</sup> *Ibid.*, at 18-11.
- <sup>138</sup> *Ibid.*
- <sup>139</sup> See R. Fox, "Obscenity" (1974) 12 *Alta. L. Rev.* 172.
- <sup>140</sup> Law Reform Commission of Canada, Working Paper No. 10, 1975.
- <sup>141</sup> *Ibid.*, at 48.
- <sup>142</sup> *Ibid.*
- <sup>143</sup> *Ibid.*
- <sup>144</sup> *Ibid.*, at 49.
- <sup>145</sup> *R. v. Nichols* 27 Nov. 1984, unreported (Ont.Co.Ct.).
- <sup>146</sup> *Ibid.*, at 16.
- <sup>147</sup> *Ibid.*, at 16-17



## Chapter 8

# Pornography and the Charter of Rights and Freedoms

Canadian courts have already had the opportunity to consider pornography in the context of the *Charter* so that it is possible to develop at least a tentative picture of the directions in which they seem to be moving.

For the purposes of our discussion, the relevant sections of the *Charter* are sections 1, 2, 7, 8 and 15:

### *Guarantee of Rights and Freedoms*

1. *The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by-law as can be demonstrably justified in a free and democratic society.

### *Fundamental Freedoms*

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

### *Legal Rights*

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

### *Equality Rights*

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.



(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In every one of the challenges that have thus far been brought against legislation in this area, the focus has been on the “freedom of expression” component of section 2(b). These challenges have raised one or more of the following issues in respect of that freedom:

- (1) Does the legislation in question constitute a *prima facie* infringement on “freedom of expression”?
- (2) If so, is the infringement cast in language so open-ended or vague as to offend either the “prescribed by law” requirement in section 1 or the “principles of fundamental justice” requirement in section 7?
- (3) If so, can the infringement be justified in accordance with the requirements of section 1?

Considerable light can be shed on the kinds of constraints the *Charter* imposes in this area by examining how the courts have dealt with each of these issues.

Experience thus far would suggest that most Canadian courts are prepared to acknowledge that legislation that restricts obscene or indecent speech does constitute an infringement on the freedom of expression guaranteed in the *Charter*. More often than not this acknowledgement has been implicit rather than explicit<sup>1</sup> but on occasion it has been explicit.<sup>2</sup> Some courts, however, have not been prepared to acknowledge that the freedom of expression guaranteed by section 2(b) is put at risk by legislation directed at obscene or indecent speech.<sup>3</sup> These courts have opted for the American approach in this area, which, as we will see in a later chapter, involves holding that obscenity is not protected by the First Amendment to their Constitution. The question of which of these two approaches is the correct one will obviously have to await a Supreme Court of Canada ruling before it is finally resolved.

With respect to the requirement that an infringement on freedom of expression be “prescribed by law”, the Ontario Court of Appeal has made it clear that the granting to an administrative agency of unbridled powers of censorship over a particular medium will not pass muster.<sup>4</sup> Some limits on those powers must be set and some criteria for their exercise spelled out.

However, no court has yet been prepared to hold that the vagueness inherent in the legislation in this area is sufficiently serious to warrant holding that the limits on freedom of expression embodied in it are unconstitutional. In *Luscher v. Deputy Minister, Revenue Canada, Customs and Excise*<sup>5</sup>, the judge rejected the argument that the “immoral or indecent” test in Tariff Item 99201-1 of Schedule “C” of the *Customs Tariff* failed to satisfy the “prescribed by law” requirement. And a similar argument in respect of section 159(8) of the *Criminal Code* has now been rejected in at least three cases.<sup>6</sup> It

would appear, therefore, that Canadian courts are prepared to give a good deal of leeway to the legislative draftsman in this area.

Few courts have had occasion to address the third of the three issues listed above, that dealing with the acceptability of the rationale for the limitation on freedom of expression. In some cases, counsel for the challengers have chosen to concede this issue. In others, the issue was not before the court at all. However, in the four cases in which the court has been required to deal with the issue, it has been quick to find that the limitation in question could be justified under section 1.<sup>7</sup>

It is of interest to note that the judge in another case, one in which the issue did not have to be addressed, took a cautiously activist position. In *University of Manitoba v. Deputy Minister, Revenue Canada, Customs and Excise*,<sup>8</sup> the judge expressed the view that preventing a university from importing for educational purposes a short film of a male masturbating could not be justified under section 1.

In the *Luscher* case, counsel for the appellant invoked both section 7 and section 8 of the *Charter*, in addition to section 2(b), in his attempt to have Tariff Item 99201-1 declared unconstitutional. It is not clear from the reasons for judgment just what form the section 7 argument took, but it would appear that it was the “liberty” component of section 7 that was relied upon. Whatever form the argument took, it received short shrift from the court. The judge was of the view that what Mr. Luscher was really complaining about was a loss of his property, specifically a magazine, at the border, and he noted that the drafters of the *Charter* had intentionally decided not to include any protection for property rights in Section 7. In other words, he was not prepared to construe the right to “liberty” in section 7 in such a way as to bring within its reach a right to property.

The argument based on section 8 was very straightforward. The contention was that the refusal of the Customs Officer to allow Mr. Luscher to bring his magazine across the border amounted to an “unreasonable seizure” of that magazine. The judge questioned whether or not a “seizure” could properly be said to have taken place in the circumstances, but seemed prepared to assume that it had. The real issue, he said, was whether or not the seizure was “unreasonable”. He decided it was not. It was his view that legislation that was designed to prevent what he called “socially offensive material” from coming into Canada satisfied the requirements of section 1.

On the basis of this brief review, it is possible to venture some opinions about the kinds of constraints the *Charter* might impose on legislators attempting to deal with pornography. The discussion that follows is organized in terms of the kinds of arguments that one might expect to be launched against legislation in this area. The opinions that are expressed are, of necessity, very general in nature.

Providing the legislation in this area is reasonably narrowly drawn, we cannot see Canadian courts striking it down on the basis of freedom of



expression. Either our courts will follow the American lead and hold that a certain category of pornographic speech falls outside the scope of section 2(b) of the *Charter* (something which, as noted above, a couple of our courts have already done), or they will uphold the legislation on the basis of section 1. It seems clear that Canadian courts see very little redeeming value in pornographic material. Moreover, we sense that our courts are prepared to attach considerable importance to the purposes underlying legislation in this area. This will be especially true if those purposes are formulated in the terms of the need to respond to real social harms such as promoting violence against women and children and encouraging discrimination against women. In this regard, note should be taken of the recent decision in the case of *Regina v. Keegstra*.<sup>9</sup> In that case, an argument was made that the hate propaganda section of the *Criminal Code* was unconstitutional because of the effect it had on freedom of expression. In the course of rejecting that argument, the court placed great emphasis on the entrenchment in the *Charter* of the right to equality. It was appropriate, the court said, to limit freedom of expression for the purpose of promoting the goal of equality.

The decision of the Ontario Court of Appeal regarding the need to provide reasonably clear guidelines to a censorship body is obviously an important one. Failure to provide such guidelines will result in the body losing its powers.

Legislative drafters in this area must, of course, be concerned to some extent about arguments based on the doctrine of vagueness. However, experience both in the United States and in Canada would suggest that courts will not require a great deal of precision in the formulation of the legislative standards that are imposed. The courts in both countries seem to acknowledge the difficulty legislators face in this area.

Arguments based on property rights are unlikely to get very far at all. As the *Luscher* case points out, the *Charter* makes no mention of property rights, and it is not going to be easy to persuade a court to read them into some other provision.

If possession of certain material for personal use were to be made an offence, there can be little doubt that a right to privacy challenge would be forthcoming. In order to succeed in such a challenge, it would, of course, be necessary to establish that such a right exists. And that, we are led to believe, would be no easy task. Even if the courts were prepared to accept that such a right exists, and that the offence of possession for personal use infringed upon that right, they might still be prepared to uphold the legislation on the basis of section 1. One suspects that they would require good reasons to be given in support of the need for such an offence, but if, as one could persuasively argue, the harm caused by pornography stems from its impact on the consumer, that might well be sufficient.

We doubt very much that section 15(1) would ever be used by the courts to strike down legislation in the area of pornography. While such legislation will no doubt be found to contain inequalities, in the sense that it will treat



some groups differently than others, these inequalities are unlikely to bother the courts a great deal. Even if it could be argued that the producers, sellers and consumers of pornography constitute a group suffering some form of discrimination, it is doubtful whether the courts would evince any sympathy for them. As the *Keegstra* case suggests, the role that section 15(1) is more likely to play in this area is that of a justification for legislation directed against pornography.

The *Luscher* case indicates that section 8 of the *Charter* is likely to be used by challengers in this area. Although the argument in that particular case was not successful, section 8 has been used to good effect in a number of *Charter* cases thus far. The most important of these is *Southam Inc. v. Hunter*,<sup>10</sup> a recent decision of the Supreme Court of Canada. In that case the Court held that, as a general rule, searches and seizures can only be conducted pursuant to warrants issued by an impartial and independent person on the basis of evidence given on oath. This pronouncement has put at risk many existing search and seizure provisions in provincial and federal legislation alike, and drafters of any new legislation will obviously have to be mindful of it.

It is clear that the existing provisions of the *Customs Act* would not meet the standard prescribed by the *Southam* case. It appears, however that searches and seizures conducted pursuant to customs legislation are viewed as a special case, and that the general rule would, therefore, not apply.<sup>11</sup> The likelihood is, therefore, that, provided Customs Officers do not abuse their powers, the existing provisions will satisfy the *Charter*.

To date, despite the background of liberalization of the application of obscenity law in recent decades, the courts have used the *Charter* very carefully. Indeed, the signs are that they are prepared to take seriously the task of balancing individual rights and social concerns, and to pay attention to other community members' rights which are at the root of the broader social concern with pornography.

## Footnotes

- <sup>1</sup> *Ontario Film and Video Appreciation Society v. Ontario Board of Censors* (1983), 34 C.R. (3d) 73 (Ont.Div.Ct.), affirmed (1984), 5 D.L.R. (4th) 766 (Ont.C.A.); *University of Manitoba v. Deputy Minister, Revenue Canada, Customs & Excise* (1983), 4 D.L.R. (4th) 658 (Man. Co. Ct.); *R. v. Red Hot Video* (1984), 11 C.C.C. (3d) 389 (B.C.Co.Ct.) *Re Red Hot Video and City of Vancouver* (1983), 5 D.L.R. (4th) 61 (B.C.S.C.) reversed on other grounds by the B.C.C.A. in short oral reasons given in February, 1985.
- <sup>2</sup> *Luscher v. Deputy Minister, Revenue Canada, Customs & Excise* (1983), 149 D.L.R. (3d) 243 (B.C.Co.Ct.); *R. v. Wagner* (unreported, 16 January 1985, Alta. Q.B.).
- <sup>3</sup> See *Koumoudouros v. Corporation of the Municipality of Toronto* (1984), 6 D.L.R. (4th) 523 (Ont.Div.Ct.); *Schindler v. Deputy Minister, Revenue Canada, Customs and Excise* (unreported, 1983, Ont.Co.Ct.).
- <sup>4</sup> *Ontario Film and Video Appreciation Society v. Ontario Board of Censors*, *supra*, note 1.
- <sup>5</sup> *Supra*, note 2.
- <sup>6</sup> *R. v. Red Hot Video*, *supra*, note 1; *R. v. Ramsingh* (1984), 14 C.C.C. (3d) 230 (Man.Q.B.); *R. v. Wagner*, *supra*, note 2.
- <sup>7</sup> *Luscher v. Deputy Minister, Revenue Canada, Customs & Excise*, *supra*, note 2; *Re Red Hot Video and City of Vancouver*, *supra*, note 1; *R. v. Ramsingh*, *supra*, note 6; and *R. v. Wagner*, *supra*, note 2.
- <sup>8</sup> *Supra*, note 1.
- <sup>9</sup> Unreported, 5 Nov. 1984, Alta.Q.B.
- <sup>10</sup> (1984), 11 D.L.R. (4th) 641 (S.C.C.).
- <sup>11</sup> *R. v. Simmons* (1984), 7 D.L.R. (4th) 719 (Ont.C.A.)

## Chapter 9

# Canada Customs

### 1. Introduction

There exist a variety of federal legislative provisions that attempt to prohibit or regulate the distribution of what we can conveniently describe as pornographic material. The legislation has both general and particular application.

Various departments of the federal government have such provisions in their enabling legislation. In addition, there are complementary provisions of the *Criminal Code*.

Not only are there different legislative descriptions of what kind of material is affected; the different descriptions are not even defined in the legislation. As a result, the different descriptions have been the subject of conflicting judicial comments and decisions and have, understandably, led to considerable administrative grief.

We have identified three significant service areas where federal legislation is used to attempt to regulate pornographic material. These areas are the Customs, Postal and Broadcasting services.

As we have indicated elsewhere in this Report, the overwhelming majority of pornographic material available in Canada is produced in other countries. The methods we have or can devise to control the importation of such material into this country are, therefore, of obvious importance.

The Customs and the Postal services respectively have responsibility for goods and mail entering Canada. Their jurisdiction, to an extent, overlaps. After describing their independent roles and respective procedures, we will deal with their joint jurisdiction. The Broadcasting service will be dealt with separately.



## 2. Customs Tariff and Customs Act

Federal Customs legislation is found in two Statutes: the *Customs Act*<sup>1</sup> and *Customs Tariff*<sup>2</sup>.

The *Customs Act* contains the substantial powers given to the Customs Branch of Revenue Canada. It also gives decision-making power to Customs officers in a variety of areas and provides a regime for appeals.

The *Customs Tariff* sets out in great detail the various tariffs and the rates of duties of Customs which Canada applies to goods imported from other countries. There are three Schedules to the *Customs Tariff*, Schedule A, "Goods Subject to Duty and Free Goods", Schedule B, "Goods Subject to Drawback for Home Consumption" and Schedule C, "Prohibited Goods".

All goods entering Canada are subject to examination by Customs officers for appropriate classification under the *Customs Tariff*. Under Section 14 of the *Tariff*, it is prohibited to import goods set out in Schedule "C"; these goods include, "books, printed paper, drawings, paintings, prints, photographs or representations of any kind of treasonable or seditious, or of an immoral or indecent character". (Tariff Item 99201-1).

In May 1980, the then Minister of National Revenue gave this general explanation to members of both Houses of Parliament of how Canada Customs administers its legislation in order to deal with pornographic material:

As with all goods entering the country, importations of items of this nature are subject to examination by Customs officers at the ports of entry for appropriate classification under the *Customs Tariff*. If, in the judgment of the examining officer, the importation constitutes explicit pornography, and is thus of an indecent character, it is classified under tariff item 99201-1 and, therefore, prohibited entry. All doubtful items are forwarded to Ottawa where they are reviewed by departmental officers and, if found to fall under the provisions of the item, they are declared prohibited importations. The decisions are then communicated to the Collector of Customs who, in turn, advises the importer accordingly. The importer is also notified of his statutory right of appeal to the Deputy Minister (section 46 of the *Customs Act*) for a reclassification of the goods. Should the appeal be denied, the importer can further appeal to the judge of the county or district court as provided by section 50 of the *Customs Act*. The final decision, then, rests with the courts and not Canada Customs.

Canada Customs does not censor importations in the sense of deleting portions of films or magazines, or set age limitations for their viewing or purchase. Rather, the role is one of determining whether specific items are to be classified under tariff item 99201-1.

The criteria used for determining the admissibility of those items considered susceptible to the tariff item are based on the related sections of the *Criminal Code* which deal with "obscene" matters and on court decisions made under the *Criminal Code* and under the *Customs Act*. Since the administration reflects the standards of the community at large, these criteria, which are

national rather than local, have changed over the years and certain magazines which might have been prohibited in the past as indecent are now admitted. To assist examiners in this classification at the port level, guidelines have been issued, ... and, in addition, decisions made by Headquarters are circulated to Customs Regions at two-week intervals.

In order to assist its officers in the field to decide if particular goods are “of an immoral or indecent character” and, therefore, prohibited, the department issued so-called “policy guidelines”. These guidelines have not been formally revised since October, 1977 and are as follows:

#### *Policy Guidelines*

9. (1) In its formulation of the policy governing the administration of this item the Department is guided by the decisions handed down by the Canadian Courts and by the definition of obscenity contained in Section 159(8) of the *Criminal Code* ... :

(2) For the purpose of assisting field officers in making judgments, the following guidelines are to be followed:

The following material will be dealt with at field level for initial classification and will be prohibited:

(i) illustrated material containing hard-core pornographic pictures which lewdly and explicitly display the male and female sexual organs, sexual intercourse, sexual perversions and such acts, including bestiality.

(ii) Reading material, containing explicit hard-core fictional text dedicated entirely to sexual exploitation and containing no redeeming features. The primary source of material of this character is the paper-back, or so called “pocket” publications.

The following material will be referred to headquarters for initial classification:

(iii) That type of material, the so-called “grey area”, with illustrations depicting similar subjects to those described in 9(2)(i) but in a less explicit fashion, with emphasis, however, mainly on sexual activities and apparently designed to appeal in the same way as hard-core pornography. In this category are the pseudo or so-called “Nudist” and “Film” magazines which make pretensions to being bona fide but which include lewd or other pornographic displays.

(iv) Any publication which despite its format or alleged scientific, medical or artistic purpose appears to be in essence an indecent or immoral publication in disguise. ...

(vii) Any publication which appears to advocate, promote or incite hatred against any identifiable group, that is, by colour, race, religion or ethnic origin.

(viii) Any publication concerned with violence which counsels, appears to incite, advises, recommends or persuades persons to commit acts of violence which are prohibited by the *Criminal Code*.

Generally speaking, items which do not fall within the foregoing categories may be allowed to be imported including the so-called “naughty” or “spicy” girlie type magazines where the models are partially clad so that the genitals are not exposed and perversions are not depicted. Cultural and educational publications and bona fide nudist magazines, although illustrated with nude males or females but not including indecent poses or over-emphasis of the sexual organs, are also considered admissible. Non-illustrated fictional

reading material (or with inoffensive illustrations) which does not fall in the category of hard-core pornography described in 9(2)(ii) should be allowed to be imported. It is thus the policy to prohibit only hard-core material of the latter type and this will be done at the field level. In case of doubt the material may be forwarded to headquarters for guidance.

The fact that the "Policy Guidelines" have not been revised for several years does not mean that the department has treated what is contained in them as immutable. There have been a great number of information bulletins and internal memoranda circulated within the Customs Branch, designed to update information and data both about inspection policy and actual decisions on material.

In describing the process they follow in dealing with pornographic materials, Customs has told us that the material is brought into Canada by visitors, returning residents, magazine and film distributors, research and scientific groups and institutions. All methods of transport are used, including the mail.

While there were only 70 actual seizures of pornographic material in 1983, it must be recorded that seizure is the ultimate procedure taken under the *Act* and that, while no actual records exist, it is well known that there were a large number of both confiscations and voluntary releases.

In dealing with commercial shipments of magazines, the department fosters a system of so-called "voluntary compliance", whereby a distributor can provide Customs with a single copy and obtain an advance ruling on the admissibility of an entire shipment. As one might expect, distributors of large commercial shipments take advantage of the procedure as a saving both in time and expense against the possibility of an ultimate finding that the goods are prohibited.

No administrative or service fee is charged at the time goods are cleared, either in advance or in the ordinary course.

Field officers can decide on the admissibility of material, or they can forward the material to the appropriate regional office. There, an officer referred to as a "commodity specialist" makes the decision based on the department's policy guidelines. The department concedes that not all officers and all regions are applying the policy guidelines in a uniform manner. Clearly this results both from the fact that the guidelines themselves are imprecise and also from the fact that the people making the decisions may have genuine disagreements.

Commodity specialists within the department receive "on the job training". They are usually officers already experienced in the department who take their turn dealing with pornographic material. We understand that the present Minister has asked that a review be undertaken of training programs available to both field officers and commodity specialists.



The task of the regional commodity specialists includes a number of clerical functions, and in the absence of any computer assistance, the entry and retrieval of data is a time-consuming, inefficient, inexact and slow process. In terms of the equipment it has, the department is not only unable to efficiently deal with its work load, but it is also unable, in a timely fashion, to keep itself well informed of its own decisions.

The department agrees and has told us that:

The capture, storage and retrieval of information relating to attempted importations of immoral or indecent materials are currently inadequate. The system does not provide sufficient information for a complete and accurate data base, which could serve future investigations. The system is being developed to overcome this problem.

The department now issues a monthly list of the material that has been prohibited. The list typically runs to about 80 pages and is updated each month. While each of the Customs officers nationwide does not receive a copy of the list, each has access to the information. As we understand it, however, the Department has no separate computer facilities and competes with other government departments for computer time. The computer information flow appears to be from Ottawa headquarters to the regions. There is no computer information flow from the regions to Ottawa.

As the former Minister indicated in the passage set out earlier, generally describing the Customs process, an importer can appeal a determination classifying goods as being "prohibited" at the time of their entry. The initial appeal is to a Dominion Customs Appraiser and must be taken within 90 days. A subsequent appeal to the Deputy Minister of Revenue Canada must be taken within 90 days. No administration fees are payable with respect to these appeals. An appeal from the Deputy Minister of Revenue Canada lies to either the county or district court depending on the province where the matter arises.

The volume of appeals to the Deputy Minister is considerable. The following table contains the most current data available to us showing the disposition of appeals to the Deputy Minister for the first six months of 1984.

As the figures show, the overwhelming majority of cases arose as a result of material that had been sent through the mail. Of the total 223 appeals, 61 were successful or partially successful.

We do not have any information about the number of cases that went on to appeal in the courts.

If the "Policy Guidelines" and the related documentation we have referred to earlier, have been used by Canada Customs to give effect to goods that are "of an indecent or immoral character", what interpretation have the Courts given to the term?

Generally speaking, the courts have held that the contemporary community standards of tolerance is the test to be applied.<sup>3</sup> However, there

DECISION	PROHIBITED		RELEASED		PARTIALLY RELEASED			
	# of cases	# of items	# of cases	# of items	Total # cases	items	Prohibited items	Released items

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DATE	NON-MAIL							
January 84	2	5	—	—	0	0	0	0
February 84	2	9	—	—	0	0	0	0
March 84	2	5	—	—	3	3	2	1
April 84	3	22	—	—	0	0	0	0
May 84	0	0	—	—	1	22	21	1
June 84	2	11	—	—	2	78	74	4
TOTAL	11	52	—	—	6	103	97	6

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MAIL								
January 84	54	196	8	14	22	284	213	71
February 84	25	122	4	6	0	0	0	0
March 84	45	226	5	27	5	23	17	6
April 84	25	87	2	5	3	36	22	14
May 84	38	260	1	1	1	6	5	1
June 84	25	140	2	3	2	31	25	6
TOTAL	212	1,031	22	56	33	380	282	98

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TOTAL								
January 84	56	201	8	14	22	284	213	71
February 84	27	131	4	6	0	0	0	0
March 84	47	231	5	27	8	26	19	7
April 84	28	109	2	5	3	36	22	14
May 84	38	260	1	1	2	28	26	2
June 84	27	151	2	3	4	109	99	10
TOTAL	223	1,083	22	56	39	483	379	104

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remains some confusion surrounding the precise nature of this test. For example, in *Priape Engineering et al v. Deputy Minister of Revenue Canada*<sup>4</sup> the court expressed the view that, while indecency and immorality suggest a similar standard, this standard might differ from the test for obscenity under section 159(8) of the *Code*, with “obscene” slightly higher on the scale of unacceptability than “immoral or indecent”. If this interpretation is correct, it is possible that goods may be prohibited under the *Customs Tariff* which would not be illegal under the *Code*.

On the other hand, there have been cases where goods allowed through Customs have been found to be “obscene” under the *Code*.<sup>5</sup>

These apparently conflicting decisions illustrate the difficulties that are inherent when different legislation uses different words in attempting to deal with what some regard as qualitatively the same material.

A new and further complication in the administration of Customs has arisen as a result of the 1983 decision of the County Court of Manitoba in the *University of Manitoba v. Revenue Canada*.<sup>6</sup> The court held that material sought to be imported by the University’s medical faculty was not prohibited as being “immoral or indecent” because it had been produced for a *bona fide* medical teaching institution. The result of this decision is that Customs must now, in effect, consider the *use* to which the material is to be put in order to decide whether or not it should be prohibited.

### 3. Incidental Customs Data

Our discussions with the Deputy Minister of Revenue Canada Customs and Excise and his officials have been comprehensive and very helpful. They have enabled us to put into some perspective the administrative problems that surround controlling the mass of material that enters Canada each year. There are approximately 400 ports of entry and 12 regional administrative Customs offices in Canada, staffed by between 2,500 and 3,000 Customs officers. Eighty million individuals entered Canada in 1983, half were visitors and half were returning Canadians. During the period March 31, 1982 to April 1, 1983, approximately 6.5 million commercial shipments and approximately 13.5 million pieces of mail entered Canada.

While Customs deals with a huge volume of material, it is clear from their experience that only a portion of goods brought into Canada is actually declared.

It is estimated that Customs officers actually inspect the luggage of approximately 7% of those persons entering Canada. Of the commercial shipments processed through Customs at the moment, about 5% of the material is actually examined. We understand that these statistics are a direct function of both time and available resources as well as assigned priority.

The resources of the Customs Branch are, of course, at the disposal of the federal government. Accordingly, Customs’ priorities are subject to political will. At various times in the recent past, Customs received instructions to make *Tariff* items involving clothing and automobiles an administrative priority. No special priority has been ordered with respect to pornographic material. Among



other things, the lack of political will has impacted on the treatment Customs has been able to give to the importation of pornographic material.

Canada Customs estimates the current sources of pornographic material in this country are: the United States 85%, Europe 12% and domestic 3%. In their experience, the material comes in the form of books, magazines, pictures, sound recordings, video cassettes, movie films, computer games and television transmissions received by satellite dishes. The material appears to be increasingly explicit and violent. Pornography involving children seems to be well hidden and is not frequently encountered by Customs officers. While the department does not keep statistics on the likely dollar value of the prohibited goods, it agrees that the figure is probably in the tens of millions of dollars annually.

It is estimated that there are now approximately 400,000 privately owned video cassette recorders in Canada. The sales and rental figures for pornographic videotapes are not available, but even adopting the most conservative estimate, there is a ready market. The vast majority of original tapes are produced in the United States. The supply of tapes in the Canadian marketplace must, therefore, either have been imported from the United States or other of the producing countries, or have been copied in Canada from the originals. From what we can tell, the original tapes are not being cleared by Canada Customs. However, the foreign produced material abounds in Canadian video stores.

Red Hot Video is a British Columbia concern with stores in seven cities in that province. It advertises itself as Canada's leading supplier of "adult videotapes" and claims that its features are "uncut and sexually explicit". Its 1984 adult video catalogue lists 295 titles. The Pacific Region of Canada Customs advises us that it has never received an application by Red Hot Video to clear material under the *Customs Tariff*. The source of the company's supplies is apparently unknown, yet it is clear that most, if not all, of their products are produced outside of Canada.

Customs is aware that large quantities of empty tape boxes have been shipped from the United States to destinations in Canada. The empty boxes are themselves not in violation of the *Tariff*. The covers advertise known pornographic titles. The advertised tapes have not been included in the shipments. One of the inferences that can be drawn is that the actual tapes have been relabelled with false titles and have reached Canada undetected. The relabelling of tapes is a common service provided by some American video shops selling to Canadian customers who wish to avoid a Customs declaration.

We have seen evidence that pornographic material is being transmitted via satellite to Canada. There is widespread belief that the material is then re-recorded here for distribution. We, in Canada, have not given much thought to how our existing Customs legislation and administrative procedures can be amended to accommodate the consequences of this technology.

## 4. Film and Video Material

The present Canadian regime for dealing with imported film material has divided jurisdiction between federal Customs and provincial film classification boards. Customs clears the material into the country and the boards classify it where it is intended for public showing. In other countries, and in some other federal states, Customs has the complete jurisdiction to admit and to classify films. The efficiency of such a system is matched by its obvious consistency.

In the course of our public hearings, there were suggestions that only Canada Customs be given the responsibility for the classification of films as part of its clearance procedure. It was pointed out that the standards of classification boards vary across the country and that not only are the results inconsistent for the viewing public, but distributors face a multiplicity of bureaucracies if they wish to show a film in all parts of Canada.

The current Canadian practice appears to have developed for a variety of reasons. One reason has to do with our Constitution. Parliament has the power to control Customs. Provincial legislatures have the power to regulate local business undertakings, including the public showing of films.<sup>7</sup> It is an open question whether the federal power would extend to having films classified as part of the Customs process, but there is reason to doubt that it would.

Another reason for the existing practice has to do with Canada's cultural and regional diversity. Canada's experience has traditionally been that very little, if anything, can be treated monolithically. The creative expression of our cultural diversity has proceeded along regional and linguistic lines. The classification of films by provincial or regional bodies has been a part of this tradition. We have celebrated our regional diversity in Canada. It is part of what we think unites rather than divides the country and it is difficult to imagine that any proposal to do away with the provincial film classification boards would be viewed as a recommendation for progress.

Just as important, perhaps, is the view that it is not and should not be the role of Customs to act as arbiter of the public taste. It is thought by many that the role of Customs should be confined to a determination of whether goods should be prohibited entry on the basis of a standard that is really little more than an objective formula. Many people believe that to extend the function of Customs to include a determination of what material is publicly acceptable, would be to give it a role it should not have.

A more complete description of the existing various provincial film classification procedures appears in Chapter 14 of this section. Suffice it to say that all the provinces and both territories have either established a classification board or made arrangements to use the services of a provincial board. All films must be classified if they are intended for public showing in a province or territory.



The importer of films for public showing has two hurdles to leap. Firstly, the film must be cleared by Customs and secondly, before it can be shown, the film must be classified. For an importer, there is little point in obtaining Customs clearance if a film is ultimately refused provincial classification.

As a practical response to this dilemma, there has developed a long standing practice of co-operation between Customs and the provincial classifiers. The political nature of the co-operation differs from province to province, however.

In Québec, as previously discussed, a practice has developed over the last 20 years whereby Customs allows importers 60 days in which to have a film approved by the classification board. If the film is approved, then clearance by Customs follows, otherwise the film will be prohibited. One of the aspects of this self-regulating arrangement that has attracted criticism is the fact that the importer is given possession of the film for the purpose of conveying it to the board. The possibility clearly exists that, while the material is out of the control of Customs, it may be copied and then distributed in its original form. It is clear that the technology now exists to copy the material onto video cassettes. We were told that such video cassettes are in wide circulation despite the fact that original versions of the films were rejected by both the classification board and Customs. The existing practice involving the so-called "60 day rule" appears to be a vehicle that can make a nonsense of the whole regime of Customs inspection.

In British Columbia, there is currently a written agreement providing for Customs to forward directly to the classification board films destined for public viewing in theatres, bars or discos. After the board has reviewed and rated the film and made any cuts, it is returned to Customs for appropriate action, namely, release or prohibition or destruction by the importer. An important feature of the arrangement is that the film remains under continuous Customs control. Under the arrangement, Customs does not delegate away its responsibility under the Customs legislation. Customs retains its ultimate jurisdiction to give clearance to a film, but its decision to do so is based on the informed report received from the classification board.

Customs has proposed that a similar formal arrangement be made with the other seven provincial classification boards. It is proposed that the arrangement extend to all so-called "commercial films", i.e. films intended for public viewing, including 8 mm., 16mm. and 35mm. film as well as video cassettes and slides. Customs has indicated that the scope of the proposal will not extend to "recognized movie chains" though the possibility of so extending it is left open.

The procedure contemplated has these significant aspects:

- (a) Customs makes an immediate decision on whether the film is intended for public showing;



- (b) If the decision is affirmative, the importer is advised that he can either have the film returned to the sender or it can be forwarded to the provincial classification board under Customs control;
- (c) If the importer elects to have the film forwarded to the board, it will view and classify the film and contact the importer to explain if any portions must be cut. The cuts will only be made if the importer agrees. If there is agreement, the cut film will then be returned to Customs for release to the importer. If there is not agreement, the film will be exported or destroyed under Customs supervision as the importer wishes;
- (d) "Customs will retain the right to view and classify for Customs entry purposes any commercial film and may do so in exceptional circumstances".

We understand that New Brunswick, Ontario and Saskatchewan have joined British Columbia in agreeing with the arrangement and that it will become effective in these provinces on April 1, 1985. The provinces of Nova Scotia, Manitoba and Alberta are still considering the proposal.

In Chapter 14 dealing with film classification, we express our views on the efficacy of the different methods of classification. Regardless of the classification method employed, it is clear that co-operation between Customs and classification boards is both sensible and, on an ongoing basis, essential.

## 5. Enforcement

Canada Customs has exclusive jurisdiction to interdict goods at its border ports. Earlier in this century the Department of National Revenue, which administers Customs, had its own "Preventive Service" to investigate smugglers and smuggling. In 1932, the Preventive Service was transferred to the Royal Canadian Mounted Police (RCMP), with the Ministry of National Revenue being given responsibility "for the policy to be adopted by the Preventive Service". The Ministry of Justice was given responsibility "for the administration of the personnel of the Preventive Service, and of the duties and interior economy of that service."<sup>8</sup>

There are currently 52 field sections of the RCMP located in various centres across Canada and dedicated to all aspects of Customs enforcement; 214 positions exist in the 52 sections. The members of the force employed in the Customs and Excise sections are experienced officers who receive specialized training in Customs enforcement and whose responsibilities include all aspects of enforcement. Accordingly, none of the officers is exclusively committed to dealing with pornographic material.

The RCMP and Revenue Canada have written agreements that came into force in September 1983, with respect to both Customs prosecution policy and the division of investigative and enforcement responsibilities. Customs has responsibility for investigation and enforcement activity with respect to the

*Customs Tariff*. The RCMP has responsibility under the agreement for the *Customs Act*, and as the agreement records, for:

Investigation of suspected smuggling where the goods have been imported into Canada at a place where no Customs office is located, or, the goods have been carried past a Customs office and ... were not included in any shipment formally entered at Customs.

The RCMP is also given responsibility for:

Investigation of offences which come to the attention of the RCMP as a result of an investigation of other criminal activities which would normally be the responsibility of Customs.

Under the terms of their agreement, co-ordinating committees of both Customs and the RCMP have been established in their respective regions and headquarters.

There are a number of offences created by the *Customs Act*. Among them are smuggling, concealing goods on one's person, making a false statement in a declaration, and keeping or selling goods unlawfully imported. Generally speaking, the present *Act* provides for seizure and forfeiture of the goods, forfeiture of the value of the goods and fines, as well as terms of imprisonment. The first two of these sanctions are usually mandatory. The third is imposed only if a criminal prosecution is launched.

With respect to the fines and terms of imprisonment, a distinction is drawn between cases involving goods with a dutiable value of less than \$200 and cases involving goods with a dutiable value of \$200 or more. (That is some indication of how old the legislation is.) Penalties are nominal if the goods have a dutiable value of less than \$200, and they are not much more severe if the value of the goods equals or exceeds \$200.

The importation of prohibited goods results in the goods being forfeited to the Crown. In addition, the importer "shall for such offence incur a penalty not exceeding \$200."

Most of the investigatory work done by the RCMP is undertaken by the force as a result of intelligence and information it has received from sources apart from Canada Customs. In this sense, the force's role is pro-active. Only a minor part of its work is reactive in the sense of acting on information received from Canada Customs.

The RCMP represents Canada in Interpol and operates Canada's National Central Bureau which links 135 countries in a system for communicating information likely to assist in preventing and suppressing crime. The National Central Bureau links the world police network with Canada's police forces and law enforcement agencies. Through the Interpol network, information on pornography is collected and disseminated to police forces and law enforcement agencies including Canada Customs.



Customs is a member of the Customs Co-operation Council, an international organization involving some 97 countries through which Customs information is exchanged. Through this mechanism, pertinent information is made available to the RCMP.

## 6. Computer and Information Services

In 1974, the RCMP established an Automated Intelligence Customs Services System (AICS) in order to provide a data base for Customs related information. Canada Customs commenced using this service in 1975. The system was originally set up to monitor large commodity shipments in an effort to counteract the activities of organized crime and commercial smuggling. As time went on, the RCMP noticed that information about smaller shipments was useful in identifying trends and in collating sources and destinations to assist in the investigation of smuggling activities. The data base was, therefore, expanded.

The AICS system was originally a "batch type" system and information was received from it by paper printout. The information that could be retrieved from the system included composite seizure statistics and information about where commodities had originated and their points of destination.

The report of the Badgley Committee has made recommendations about this information system. The report identified that about two of every five postal detentions made by Canada Customs were not included in the AICS system. Since the Badgley recommendations, Canada Customs has started providing more frequent information to AICS and has begun to provide the system with more details about both the nature and origin of goods in specific shipments.

A new and automated Police Information Retrieval System (PIRS) is now in use. This system, which is owned by the RCMP, originated in British Columbia and is in the process of being expanded to other major centres across the country. The information that is now on the AICS system will be put on the new retrieval system by June of 1985. In November of 1984, the RCMP signed a Memorandum of Understanding with Canada Customs providing for direct input into the system by both sources and agreeing that there would be continuing sharing of information.

PIRS is an "on-line" system and information will be able to be retrieved from it quickly by video screen. Under the existing "batch type" AICS system, a commodity specialist in any Customs office across Canada can access information by telephone either through the regional office or the national headquarters. Information retrieval will be much easier under the new on-line system. The amount of information will be greatly increased to include the following:

1. the route that the commodity took and how it came into Canada, including intermediate ports;



2. how the commodity was concealed;
3. where the commodity came from;
4. destination;
5. the name and address of the sender and receiver;
6. commodity type; and
7. the licence number and the name of the owner of any vehicles, vessels or aircraft involved in the transport of the commodity.

At the present time, the titles of pornographic materials are not included in the data base, nor is it proposed to include this information in the enlarged on-line data base. This is essentially because titles change frequently and regularly, in an apparent attempt to avoid detection.

The information concerning the material will stay in the data base until there has been a ruling on the material by Canada Customs. If it is deemed to be "immoral or indecent", the information about the material will remain on the data base. If it is found not to be "immoral or indecent", then the information about the material will be purged from the data base, unless it has not been declared at the time it was brought into the country and can, therefore, be treated as having been smuggled.

Information which remains on the data base is information about material that has either been found to be in violation of the *Customs Act* or the *Customs Tariff*. Information does not remain in the data base about material that has either been judged not to be in violation of the *Customs Tariff* or been properly declared.

Unless the operation is being conducted partially or totally undercover, the RCMP makes Customs aware of investigations it is undertaking. The results of all investigations are communicated to Customs.

## 7. Trends and Statistics

In 1983, the RCMP conducted an analysis of information contained in AICS relative to pornography.

For the five-year period 1978-82, a total of 7,770 importations of material deemed "indecent or immoral" were seized and/or detained by Canada Customs and the RCMP under the *Customs Tariff* and the *Customs Act*. Seizures by the RCMP constituted 9% of the total.

These figures *do not* include cases involving pornographic material which was seized under authority of the *Criminal Code* by the RCMP or other Canadian police agencies, or the majority of postal detentions by Canada Customs. However, these figures are considered by the RCMP to be

representative of the illicit trade in pornography. The primary source countries were:

United States	83%
Sweden	6%
Denmark	6%
Other	5%

Within the United States the primary source states were:

California	36%
New York	25%
Connecticut	12%
North Carolina	2%
Florida	1%
Michigan	1%
Other	23%

Los Angeles, California, was the primary source city.

The primary destinations in Canada were:

Alberta	39%
Quebec	24%
Ontario	20%
British Columbia	4%
Other	13%

The above data has been updated for the six-year period from 1979 to 1984. The RCMP alone made 1,297 seizures of pornographic material during this period. The types of pornographic material seized across the country were as follows:

Books	16%
Catalogues	6%
Magazines	28%
Film	21%
Video Cassettes	6%
Assorted	24%

With the new computer systems in place, composite information about investigation enforcement procedures undertaken by the RCMP and Customs will be more comprehensive and complete.

## Footnotes

<sup>1</sup> *Customs Act*, R.S.C. 1970, c.58.

<sup>2</sup> *Customs Tariff*, R.S.C. 1970, c.60

<sup>3</sup> *In re Hawkshaw and the Queen* (1982) 69 C.C.C. (2d) 503 (Ont. C.A.); *University of Manitoba v. Deputy Minister of Revenue Canada, Customs and Excise* (1983), 24 Man. R. (2d) 198 (Man.Co.Ct.)

<sup>4</sup> (1979) 234 C.R. (3d) 66 (Québec Superior Court)

<sup>5</sup> *Re Han and Deputy Minister of National Revenue for Customs and Excise* (1972) C.C.C. 399 (B.C.C.A.)

*Regina v. 29455 Ontario Ltd. et al* (1978) 39 C.C.C. (2d) 352 (Ont. C.A.)

*Regina v. Prairie Schooner News et al* (1970) 1 C.C.C. (2d) 251, 75 W.W.R. 585 (Man. C.A.)

<sup>6</sup> *Supra*, footnote 3.

<sup>7</sup> *Re Nova Scotia Board of Censors et al and McNeil*, [1978] 2 S.C.R. 662, (1978) 84 D.L.R. (3d) 1.

<sup>8</sup> Order in Council, April 16, 1932: P.C. 857.



## Chapter 10

# International Mail: Joint Jurisdiction of Canada Customs and Canada Post Corporation

Although Customs has the clear jurisdiction to examine all goods entering Canada by *mail*, Canada Post has a monopoly on the carriage of *letters*. The procedure Customs follows in dealing with mail and in dealing with letters is set out in section 40 of the *Canada Post Corporation Act*.<sup>1</sup> With emphasis added, it provides as follows:

(1) All *mail* from a country other than Canada containing or suspected to contain anything subject to Customs or other import duties or tolls or anything the *importation of which is prohibited* shall be submitted to a Customs officer for examination.

(2) A Customs officer may open any *mail, other than letters*, submitted to him under this section and may

- (a) cause *letters* to be opened in his presence by the addressee thereof or a person authorized by the addressee; or
- (b) at the option of the addressee, open letters himself with the written permission of the addressee thereof;

and where the addressee of any *letter* cannot be found or where he refused to open the *letter*, the Customs officer shall return the letter to the Corporation and it shall be dealt with as undeliverable mail in accordance with the regulations.

(3) A Customs officer shall deal with all *mail* submitted to him under this section in accordance with the laws relating to Customs and the importation of goods and, subject to such laws, shall deliver such mail to the addressee thereof, on payment of any postage due thereon, or shall return it to the Corporation.

(4) Any non-mailable matter found by a Customs officer in any *mail* made available to him under this section shall be dealt with in accordance with the regulations.

The important distinction between “mail” and “letter” will be referred to later. But first, we will describe the administrative activities involved in Customs inspecting goods that have arrived in Canada by mail.

Canada Post initially receives all international mail at four centres: Montréal, Toronto, Winnipeg and Vancouver. The centres receive mail from specifically identified countries and forward it to Customs at one of twenty-two primary screening centres:

- |               |                      |
|---------------|----------------------|
| 1. Toronto    | 12. Victoria         |
| 2. Montréal   | 13. Québec City      |
| 3. Vancouver  | 14. Hamilton         |
| 4. Winnipeg   | 15. Kitchener        |
| 5. Edmonton   | 16. Moncton          |
| 6. Calgary    | 17. Thunder Bay      |
| 7. Ottawa     | 18. Saint John, N.B. |
| 8. Halifax    | 19. Lethbridge       |
| 9. Regina     | 20. St. John's Nfld. |
| 10. London    | 21. Sudbury          |
| 11. Saskatoon | 22. North Bay        |

Customs officers at these centres examine the mail and decide which items they will release and which are to be held for payment of duty or taxes or further investigation. Usually the initial decision of whether to retain the mail in Customs control is made quickly on the basis of an examination of the exterior of the item. Officers make their decision based on a number of factors, including size, sender, country of origin, etc.

Those items released are then processed as part of the regular mail delivery. The items not released and which are addressed to areas not immediately serviced by the 22 primary screening centres are then forwarded by Canada Post to the Customs office serving that area. It will then notify the addressee of the fact that the mail is in Customs control. Customs may, at this stage, open and inspect the mail, but typically it will ask the addressee to open it when it is claimed. The item is then inspected and either released or found to be prohibited. If it is found to be prohibited then the goods are ultimately dealt with in accordance with the laws relating to Customs.

As section 40 requires, a special procedure must be followed by Customs where a letter (as distinct from mail) is involved. Customs cannot open a letter without the written permission of the addressee. If an addressee or someone authorized by him refuses to open a letter, Customs must then return it to the Canada Post Corporation to be dealt with as undeliverable mail. The same result occurs if the addressee cannot be found to give consent to the opening of the letter. The postal Regulations with respect to undeliverable mail require, in most cases, the return of the letter to the country of origin.

For many years the term "letter" was not actually defined in the postal Regulations or legislation. Starting in 1970, Customs operated on the basis that officers were prevented from opening any first class mail regardless of type, size or probable contents until the addressee's permission was obtained.<sup>2</sup> This procedure became unmanageable and was changed in 1978. Instructions were given to Customs officers that "a letter is interpreted to mean any item which would reasonably be assumed to consist of correspondence as its principal content and which is in an envelope".<sup>3</sup>

In 1983, Canada Post Corporation passed a regulation known as the Letter Definition Regulations. Under regulation 2:

Letter means one or more messages or information in any form, the total mass of which, if any, does not exceed 500g, whether or not enclosed in an envelope that is intended for collection or transmission or delivery to any addressee as one item, but does not include

- (a) an item carried incidentally and delivered to the addressee thereof by a sender who is a friend of the addressee; ...
- (g) a newspaper, magazine, book, catalogue, ... manuscript ...

As a result of the new Regulation, Canada Customs published a memorandum setting forth new Customs procedures for the examination of goods arriving by mail.<sup>4</sup> The memorandum advised Customs officers in part:

6. In accordance with the [Regulation] Customs Inspectors are not to open any mail item except those that are excluded by the definition (e.g. ... a newspaper, magazine, book, catalogue, ... manuscript ...) weighing 500 grams or less without the written permission of the addressee, even though goods or prohibited items are suspected to be contained in the mail item.

7. In instances where it is determined that the mail item weighs 500 grams or less and it is felt that examination is warranted because the country of origin is prominent in the drug trade, or the addressee is a known smuggler or the subject of an intelligence alert, the mail item is still not be opened except by the addressee, or the addressee's authorized agent, or with the addressee's written permission.

8. Customs Inspectors may, for purposes of examination, open without the addressee's written permission any mail item weighing in excess of 500 grams.

9. Customs is committed to maintaining the privacy of personal correspondence and will not tolerate the reading by Customs personnel of any such correspondence found in letter or parcel mail. The term "correspondence" does not include invoices, packing slips, order forms or other business documentation which may be required for Customs purposes.

The memorandum also indicated that the new procedures were "interim" pending expected revisions to the *Customs Act*. In fact, the revisions had been under consideration for several years. The last attempt at new legislation occurred when Bill C-6, the *Customs Act*,<sup>5</sup> was introduced and given first reading in the House of Commons on January 16, 1984.

The portion of the Bill dealing with the issue of the jurisdiction of Customs to inspect goods arriving Canada by mail provided as follows: (emphasis added)

92.(1) An officer may...

(b) at any time up to the time of release, examine any *mail* that has been imported and, subject to this section, open or cause to be opened any such *mail* that he suspects on reasonable grounds contains any goods referred to in the *Customs Tariff*, or any goods the importation of which is prohibited, controlled or regulated under any other Act of Parliament, and take samples of anything contained in such mail in reasonable amounts;



The term "mail" is given the meaning contained in section 2 of the *Canada Post Corporation Act*, namely, "mailable matter from the time it is posted to the time it is delivered to the addressee thereof". The term "mailable matter" in the same *Act* is said to mean, "any message, information, funds or goods that may be transmitted by post". (The term "letter" does not appear in the *Act*.)

The power to open mail given by Section 92(1)(b) is limited by sections 92(2) and 92(3), which provide as follows:

(2) An officer may not open or cause to be opened any *imported mail* that weighs *thirty grams* or less unless the person who sent it has completed and attached to the mail a label in accordance with article 116 of the Universal Postal Convention.

(3) An officer may cause *imported mail* that weighs *thirty grams* or less to be opened in his presence by the person to whom it is addressed or a person authorized by that person.

The label referred to in subsection (2) is affixed by the sender.

The necessary changes to section 40(1) and (2) of the *Canada Post Corporation Act* to accommodate the proposed *Customs Act* would result in the section reading: (the italicized portions are added to the existing section)

40.(1) All mail *arriving in Canada* from a *place outside Canada that contains or is* suspected to contain anything the importation of which is prohibited, controlled or regulated under the *Customs Act* or any other *Act of Parliament* shall be submitted to a Customs officer.

(2) All mail that is submitted to a Customs officer under this section remains, for the purposes of this Act, in the course of post unless it is seized under the *Customs Act*.

The effect of all these changes would be to allow Customs to open all international mail weighing more than 30 grams (1.05 ounces) rather than the weight ceiling of 500 grams (17.5 ounces) that presently exists. Moreover, Customs would be able to open a letter weighing less than 30 grams if it had affixed to it the label referred to in section 92(2).

It is estimated that 85% of all international mail arriving in Canada weighs less than the proposed weight ceiling of the 30 grams. The mail which Customs cannot open in the proposed *Act* would consist of what most people would understand to be a "letter". The mail which Customs can open consists of what most people understand to be packages, parcels and envelopes containing goods.

Bill C-6 died on the Order Paper at the end of June, 1984. It is expected that the Bill will be re-introduced in this session of Parliament. In the meantime, the existing Postal Regulation remains in effect restricting the inspection of international mail by Customs to material weighing more than 500 grams. It should be noted however, that excepted from this restriction are newspapers, magazines, books and catalogues.

## Footnotes

- <sup>1</sup> S.C. 1980-81-82-83, c.54.
- <sup>2</sup> Instructions to Port Officers, April 24, 1970, D4469, Files 8340-3; 8455-4 (Canada Customs).
- <sup>3</sup> Instructions to Port Officers, November 8, 1979, revision of D4469.
- <sup>4</sup> Memorandum R5-1-2, December 7, 1983.
- <sup>5</sup> Bill C-6, An Act respecting Customs (2nd Session, 32nd Parliament, 32 Elizabeth II, 1983-84).





## Chapter 11

# Canada Post

The *Canada Post Corporation Act*<sup>1</sup> does not prohibit the use of the mails to distribute pornographic material. Such prohibition is found in section 164 of the *Criminal Code* passed as part of the 1953-54 Code Amendments. The material part of this section is:

“Everyone commits an offence who makes use of the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral or scurrilous, ...”

What is deemed to be “obscene” is described in section 159(8) of the *Criminal Code*. The words “indecent, immoral or scurrilous” are nowhere defined in the *Criminal Code*. These words have, however, been given legally enforceable meaning by the Courts and have, in fact, been treated in precisely the same way as the word “obscene”. In the leading case of *R. v. Popert*<sup>2</sup> the Ontario Court of Appeal, in reversing the trial judge, said:

“I concede that the term ‘immoral’ is a word of imprecise meaning and that it may be difficult to apply. However, the problem is not unique. Often the law, whether a product of case law or statute, expresses itself in imprecise terms such as ‘reasonable’, ‘undue’, and ‘dangerous’. It is through such words that the values of the community find expression in the court-room. It is the function of the courts to work as best they can with the tools in hand. In my view, the learned trial judge was wrong in simply finding no meaning in this word.”<sup>3</sup>

The Court also decided that the appropriate test to be applied in interpreting the section was “the community standard of tolerance” and that this test, propounded in cases dealing with obscenity<sup>4</sup>, “should (also) be applied in determining whether material is immoral or indecent”<sup>5</sup> and that, “the reference to a community standard imports an objective test into the ascertainment of indecency and immorality ...”<sup>6</sup>.

While the *Canada Post Corporation Act* does not prohibit the use of the mails to distribute pornographic material, it does contain sections that provide for a degree of regulation. Section 41(1) of the *Act* provides a comprehensive procedure empowering the Minister responsible for the *Act* to make an order “prohibiting the delivery, without the consent of the Minister, of mail addressed to or posted by” any person that

the Minister believes on reasonable grounds ... is, by means of mail, committing or attempting to commit an offence, or aiding, abetting, counselling or procuring any other person to commit an offence ... or ... by a means other than mail, aiding, abetting, counselling or procuring any other person to commit an offence by means of mail.

The section contemplates an initial “interim prohibitory order”, with the “person affected” entitled to receive a copy of the order and the reasons for it. An appeal can be taken to a board of review. The board is obliged to hold a hearing and to make recommendations to the Minister.

The Minister apparently retains the discretion (regardless of the recommendations of the Board of Review) to either revoke the interim order or declare it to be a final prohibitory order. A final prohibitory order remains in effect until revoked by the Minister if “satisfied that a person affected will not use mail for any of the purposes described in subsection (1).”

The volume of mail is such that detection is clearly an enormous problem. Postal authorities are not entitled to open deliverable letters simply on suspicion. The practice the Post Office has chosen to adopt in administering the provisions of its *Act* is simply to react to complaints. No pro-active procedures are apparently in effect.

Once a complaint has been received, an affidavit is apparently obtained from the complainant verifying that the material has indeed been received through the mail. It seems that most of the current offensive material appears to have originated in the United States, although authorities have begun to notice that some of the material seems to have been produced in Canada.

Legal advice is taken on the complaint and an interim prohibitory order may be issued by the Minister on the recommendation of the chairman of the board of Canada Post Corporation.

We are not aware of how many such interim prohibitory orders have been made.

We were told that very few appeals are taken from interim prohibitory orders. We were also told that, since 1975, only 34 *final* prohibitory orders have been made against persons or corporations sending mail.

The following is a breakdown according to country of origin of the persons or corporations named in these orders:

United States	16
Denmark	6
Sweden	5
Holland	1
Canada	6

Thirty-one of the final prohibitory orders remain in effect. The three orders that have been revoked all apply to Canadians.

As a result of our discussions with Post Office officials we conclude:

1. That the interception of pornographic material in the domestic mail has been given no administrative priority;
2. That the Post Office recognizes no particular need to either assume an investigatory role or to initiate any action to attempt to better control distribution of pornographic material through the domestic mail. It appears that the present policy of acting only on complaints will be continued;
3. That there is no effective co-ordination involving the Post Office and law enforcement officials to better control the distribution of pornographic material through the domestic mail.



## Footnotes

<sup>1</sup> *Canada Post Corporation Act*, S.C. 1980-81-82-83, c.54.

<sup>2</sup> (1981), 58 C.C.C. (2d) 505 (Ont. C.A.).

<sup>3</sup> *Ibid.*, at 508-509 per Zuber J.A.

<sup>4</sup> *R. v. Penthouse International Ltd. et al* (1979), 96 D.L.R. (3d) 735 (Ont. C.A.). *R. v. Prairie Schooner News Ltd. and Powers* (1970), 75 W.W.R. 585 (Man. C.A.).

<sup>5</sup> *Ibid.*, at 510.

<sup>6</sup> *Ibid.*, at 508.

## Chapter 12

# Broadcasting and Communications

### 1. The Broadcasting Act

The Act defines broadcasting as, “any radiocommunication in which the transmissions are intended for direct reception by the general public.”<sup>1</sup>

The *Act* then provides a broadcasting policy for Canada and the mechanisms to implement that policy. It also establishes the legal framework within which radio and television undertakings are operated throughout Canada.

The Act is in three parts. The first part declares a specific broadcast policy. The second part relates to the Canadian Radio-Television and Telecommunications Commission (CRTC). The third part concerns the Canadian Broadcasting Corporation (CBC).

For our purposes, the relevant portions of part I of the broadcasting policy are:

*Section 3:* It is hereby declared that...

- (b) the Canadian broadcasting system should be effectively owned and controlled by Canadians to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;
- (c) all persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast, but the right of freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned;
- (d) the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern, and the programming provided by such broadcaster should be of high standard, using predominantly Canadian creative and other resources.

The *Act* defines “broadcasting undertaking” as including, “a broadcasting transmitting undertaking, a broadcasting receiving undertaking and a network

operation, located in whole or in part within Canada or on a ship or aircraft registered in Canada".<sup>2</sup>

The *Act* makes a distinction between "the Canadian broadcasting *system*" in section 3(b) and (c) and "a national broadcasting *service*". The system comprises both "public and private elements". The service is declared to be "a corporation established by Parliament for the purpose" and is to be "predominantly Canadian in content and character".<sup>3</sup> The national broadcasting service is, of course, the CBC. The *Act* declares that the CBC should:

- (i) be a balanced service of information, enlightenment and entertainment for people of different ages, interest and tastes covering the whole range of programming in fair proportion,
- (ii) be extended to all parts of Canada, as public funds become available,
- (iii) be in English and French, serving the special needs of geographic regions, and actively contributing to the flow and exchange of cultural and regional information and entertainment, and
- (iv) contribute to the development of national unity and provide for a continuing expression of Canadian identity;<sup>4</sup>

In 1975, separate legislation was passed concerning the Canadian Radio-Television and Telecommunications Commission.<sup>5</sup> The provisions of this *Act* are largely procedural. The substantive objects and the powers of the Commission are still to be found in Section 15 of the *Broadcasting Act* and are as follows:

Subject to ... directions to the Commission from time to time by the Governor in Council under the authority of this *Act*, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of this *Act*.

The powers of the Commission include prescribing classes of broadcasting licence, making regulations applicable to all licensees on such matters as standards of programs, conditions for the broadcasting of network programs and the operation of stations as part of a network.<sup>6</sup>

The Commission has nine full-time members and ten part-time members appointed by the Governor in Council.<sup>7</sup> From the ranks of the full-time members, the Governor in Council designates a chairman and two vice-chairmen of the Commission.<sup>8</sup> The nine full-time members constitute an Executive Committee,<sup>9</sup> whose powers include issuing and renewing broadcasting licences and imposing or amending such conditions of licence as are deemed appropriate.<sup>10</sup> While the Executive Committee can issue or renew a licence, only the full Commission can revoke a licence.<sup>11</sup>

The Commission is obliged to hold a public hearing in connection with either the issuing of a broadcasting licence or its revocation or suspension.<sup>12</sup> The Executive Committee, if it is satisfied that it is in the "public interest" to do so, may decide to hold a public hearing in connection with the amending of a broadcasting licence or "a complaint by a person with respect to any matter



within the powers of the Commission”.<sup>13</sup> The Commission has the powers, rights and privileges of a superior court of record in respect of public hearings and can, for example, require the attendance of witnesses, the production and inspection of documents and property and the enforcement of its orders.<sup>14</sup>

The Commission can make its own rules, “respecting the procedure for making applications, representations and complaints and the conduct of its hearings and business”.<sup>15</sup>

The *Act* provides for appeals from the actions taken by the Commission. Any decision or order that relates to the issue, amendment, renewal, revocation or suspension of a broadcasting licence can be appealed to the Federal Court of Appeal. The appeal is, however, limited to questions of law or jurisdiction.<sup>16</sup>

There is also an appeal to the Governor in Council. But the appeal is limited to the issue, amendment or renewal of a broadcasting licence. The Cabinet has 60 days from the date of such issue, amendment or renewal to decide whether to refer the matter back to the Commission for recommendation and hearing.<sup>17</sup>

The Commission must then hold a hearing and reconsider the matter, and may either rescind its earlier decision, issue a licence on the same or different conditions to any other person, or confirm its earlier decision with or without alterations.<sup>18</sup> If the earlier decision is confirmed, then the Cabinet still retains the power to set aside the confirmation order.<sup>19</sup> If the Commission issues a licence on different conditions or to someone else, then this action would appear to be subject to a further appeal to the Cabinet.

In summary, the Cabinet has the ultimate power to overturn a decision made by the Commission concerning the issue, amendment or renewal of a broadcasting licence. At the moment, the Cabinet has apparently no power to ultimately decide on matters of licence suspension or revocation. The Commission’s exclusive jurisdiction in this area is subject only to an appeal to the Federal Court of Appeal based on questions of law or jurisdiction.

The Commission is obliged to hold a hearing and satisfy itself that the licensee has violated or failed to comply with any conditions of the licence before that licence can be revoked or suspended. Where the Commission finds that there has been such a failure or violation it must report its findings and recommendations to the Minister of Communications who must, in turn, lay the report before Parliament.<sup>20</sup> The report to the Minister and ultimately to Parliament, appears to be for information only.

The Commission has the general requirement to report annually to the Minister and to Parliament on its activities.<sup>21</sup>

On December 20, 1984, Bill C-20, *An Act to amend the Canadian Radio-Television and Telecommunications Commission Act, the Broadcasting Act and the Radio Act*, was given first reading in the House of Commons. Second

reading took place on February 14, 1985. The *Act* contains significant amendments that will be referred to in the course of the discussion leading to our recommendations.

## 2. The Canadian Radio-Television and Telecommunications Commission

During our public hearings we received many comments about the CRTC. Details of the comments appear in Section I, Chapter 5. The concern most frequently expressed was the alleged failure of the Commission to supervise program content generally and particularly with respect to pay television. We were also told that the Commission should control programming available by means of satellite antenna. Some complained that the Commission did not have an adequate appreciation of the concerns parents have about the content of programs that could be seen by their children. There was also an allegation that the Commission was not prepared to take any or any effective action to prevent offensive program content.

Our Committee met with the Chairman and some of the members of the Commission as well as with the Commission's staff. We discussed relevant aspects of the Commission's work and there have been a variety of subsequent consultations. In view of some of the comments made at our public hearings, we think it is important to record that the Commission has been completely co-operative and forthcoming in the course of our contact with it. We are satisfied that the Commission has no desire for isolation or aloofness on the subject of program content and regulation; indeed, quite the contrary. The Commission follows a practice of publicizing its proposed policy and operational changes and of inviting public response. Its record of organizing and achieving public involvement, both at the level of written response and public hearings is, in our view, impressive.

There are now more than 3,000 licensees in Canada holding licences for AM and FM radio broadcasting, as well as television stations, cable systems and pay television. The Commission currently employs a total of 432 employees. The Commission takes about 3,000 decisions every year and while some of the decisions are routine, others require lengthy and careful examination. The important public hearing and accountability requirements contained in its legislative mandate require the Commission to move with deliberate speed. We think the Commission's present resources are being fully utilized.

As will be apparent in the course of the discussion that follows, the Commission has taken several important initiatives with respect to program content and the administration of its mandate.

It must be understood at the outset that the Commission does not and cannot perform the role of a censor. The scheme of the existing legislation does not provide for any pre-clearance of material. The role of the Commission is to

review programming after the fact. The policy of the *Broadcasting Act* states clearly in section 3 that responsibility for program content rests with the licensee. The Commission's potential power in the area of program content is limited to passing appropriate Regulations, attaching conditions of licence in the first instance, revising conditions of licence and reviewing actual performance during the term of the licence, if necessary, and always on an application for renewal.

The view that the Commission has no jurisdiction to act as a censor was expressed by the Federal Court in *National Indian Brotherhood v. Juneau*.<sup>22</sup> The Court said:

Reading the Act as a whole..., I find it difficult to conclude that Parliament intended to or did give the Commission the authority to act as a censor of programs to be broadcast or televised. If this had been intended, surely provision would have been made somewhere in the Act giving the Commission authority to order an individual station or a network, as the case may be, to make changes in a program deemed by the Commission, after an inquiry, to be offensive or to refrain from broadcasting same. Instead of that, it appears that its only control over the nature of programs is by use of its power to revoke, suspend or fail to renew the licence of the offending station.

We are quite definitely of the view that the legislative mandate of the Commission should not be essentially changed in order to turn it into a censor board. Even if we were philosophically convinced that the Commission should act as a censor, we have difficulty imagining how it could then possibly expect to review all of the programming currently being broadcast in Canada. The administrative costs and complications would be enormous. Just as important, in our view, the results would stultify rather than encourage appropriate creative broadcasting expression.

We are satisfied that there are many more effective ways for the Commission to deal with program content.

The CRTC's legislative scheme provides the Commission with at least four possible ways to deal with programs that are either contrary to law or sexually abusive:

- (a) by attaching program standards and conditions to a broadcast licence
- (b) by Regulation
- (c) by requiring broadcasters to self-regulate
- (d) by criminal sanctions under the *Criminal Code* or the *Broadcasting Act*.

## 2.1 Conditions of Licence

It was urged upon us at the public hearings that the CRTC should impose on a broadcasting licence, conditions concerning program content both with respect to pornography and sex-role stereotyping. As we have already mentioned, the Commission has the ability under section 17 (1)(a) and (b) of



the *Broadcasting Act* to issue, amend or renew licences subject to conditions that it “deems appropriate for the implementation of the broadcasting policy enunciated in Section 3” of the *Act*. The current relevant portions of Section 3 are set out above.

It is important to note that the conditions that are attached must be “related to the circumstances of the licensee”. The material parts of Section 17 read as follows (emphasis added)

Section 17 (1) In furtherance of the objects of the Commission, the...Commission, may

- (a) issue broadcasting licences for such terms ... and subject to *such conditions related to the circumstances of the licensee*
  - (i) as the Executive Committee deems appropriate *for the implementation of the broadcasting policy enunciated in Section 3,...*
- (b) *upon application by a licensee*, amend any conditions of a broadcasting licence issued to him;
- (c) issue renewals of broadcasting licences ... as the Executive Committee considers reasonable and subject to the conditions to which the renewed licences were previously subject or *to such other conditions as comply with paragraph (a).*

The emphasized portions serve to illustrate two important aspects of the section: firstly, an amendment to licence conditions can arise only on an application by the licensee and not at the initiative of the Commission; and secondly, that the conditions of licence must be related to the particular circumstances of the licensee.

Where the Commission has decided to impose conditions of licence, its practice has been to carefully cater to the licensee’s particular environment and to make the conditions very specific, so that compliance can be easily and clearly measured.

The question has been asked, “Why can’t compliance with the terms of the *Act* and Regulations be made a condition of licences?” The answer appears to be that to do so would be to place licensees in a position of double jeopardy where breach of the *Act* or Regulations could be not only an offence under the *Act*, but also result in loss or suspension of licence, without the appropriateness of the separate consequences being examined separately.

The question has also been asked, “Why can’t program standards be made conditions of licence?” The answer is that conditions of licence have to be “related to the circumstances of the licensee” as well as “appropriate for the implementation of the broadcast policy in Section 3”. The present policy provisions for Section 3 do not contain any declarations about program content or standards beyond what is contained in sub-section (d). Therefore, it is uncertain whether the Commission can now impose actual program standards as conditions of licence.

However, Bill C-20, referred to earlier, would amend Section 3 by adding the following to the broadcasting policy contained in the *Act*:

(C.1) the programming provided by the Canadian broadcasting system should respect and promote the equality and dignity of all individuals, groups or classes of individuals, regardless of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In proposing this amendment, the government has accepted the June, 1984 recommendation of the Parliamentary Subcommittee on Sexually Abusive Broadcasting.

Speaking to the Bill in the House of Commons, the Minister of Communications said:

Part II of the Bill provides for a new policy objective that will become part of Section 3 of the Broadcasting Act. This objective concerns programming of an abusive nature, and its purpose is to define the CRTC's responsibility in this respect. It will be an incentive for broadcasters to be increasingly aware of the problem.<sup>23</sup>

Should the above amendment become law, it would appear that the Commission will then be able to impose conditions of licence relating to the standard of programming described in the proposed (C.1).

However, the imposition of such conditions could only arise "subject to such conditions related to the circumstances of the licensee".<sup>24</sup> It is difficult to know how the Commission could impose such a general programming condition of licence in the absence of any specific reasons relating to a particular licensee. As the Chairman of the CRTC said in an appearance before the Sub-Committee of the Standing Committee on Communications and Culture on May 9, 1984:

In the ... areas of ... conditions of licence ... the CRTC could further address the problem of sexually abusive programming. The CRTC could, if it considered such a measure necessary in a particular case, indicate for example to that licensee that as a condition of its licence it must observe some guidelines concerning sexually abusive programming. It must be remembered, however, that a new condition of licence cannot be imposed on an existing licensee, except at the time of licence renewal.<sup>25</sup>

In the result, the proposed amendment adds a new and salutary policy objective to the *Broadcasting Act* which, in appropriate particular cases, could be made a condition of licence.

## 2.2 Regulations

As we have mentioned, under Section 16 of the *Broadcasting Act* the CRTC may make Regulations "in furtherance of its objects". Under the existing legislation the Commission may make Regulations applicable to *all* licensees and relating to a variety of matters, including "standards of program" and "such other matters as it deems necessary for the furtherance of its objects".<sup>26</sup>

Some years ago, the Commission made Regulations in this area applying to all public broadcast licensees. The Regulations for AM and FM radio licensees provided the following as part of regulations 5 and 6 respectively:

- (1) No station or network operator shall broadcast
  - (a) anything contrary to law;
  - (b) any abusive comment on any race or religion;
  - (c) any obscene, indecent or profane language.<sup>27</sup>

The Regulations for television licensees provided in part:

- 6 (1) No station or network operator shall broadcast
  - (a) anything contrary to law;
  - (b) any abusive comment or abusive pictorial representation on any race, religion or creed;
  - (c) any obscene, indecent or profane language or pictorial representation.<sup>28</sup>

The ability of the Commission to pass such Regulations has been challenged in prosecutions for their alleged breach. In 1977, the Saskatchewan Magistrate's Court found that a radio broadcast containing a poem and comments on the poem about the Pakistani race were abusive, but concluded that the Regulation did not reasonably fall under Sections 3 and 16 of the *Act* and was, therefore, beyond the power of the Commission to enact.<sup>29</sup>

This decision was reversed in the Saskatchewan Court of Appeal. The Court held that the Magistrate erred in holding that Regulation 5(1)(b) of the Radio A.M. Broadcasting Regulations was beyond the authority of Section 3 and 16 of the *Broadcasting Act*. The Court, however, gave no reasons for its decision.

The question was considered and apparently resolved in favour of the Commission's power by the Supreme Court of Canada in 1978.<sup>30</sup> A case arose when a radio station broadcast a telephone interview without the consent of the person interviewed. The station was charged with a breach of Regulation 5(1)(k) which provides:

- 5 (1) No station or network operator shall broadcast...
  - (k) Any telephone interview or conversation, or part thereof, with any person unless
    - (i) the person's oral or written consent to the interview or conversation being broadcast was obtained prior to such broadcast, or
    - (ii) the person telephoned the station for the purpose of participating in a broadcast.

The lower courts were divided on the questions of firstly, whether the Regulation was beyond the power of the Commission to enact and secondly, the nature of the Commission's power to regulate programming.

In deciding that the Commission had the power to enact the Regulation, the majority of the judges in the Supreme Court of Canada found that:



...the validity of any Regulation enacted in reliance upon Section 16 must be tested by determining whether the Regulation deals with a class of subject referred to in Section 3 of the statute and that in doing so the Court looks at the Regulation objectively.<sup>31</sup>

The Court agreed with the following comment made by one of the judges who had heard the case in the Ontario Court of Appeal:

It is obvious from the broad language of the Act that Parliament intended to give to the Commission the wide latitude with respect to the making of Regulations to implement the policy and objects for which the Commission was created.<sup>32</sup>

The Supreme Court concluded that:

... whether we consider that the impugned Regulation will implement a policy or not is irrelevant so long as we determine objectively that it is upon a class of subject referred to in Section 3.<sup>33</sup>

The Court decided that the Regulation fell within the class of subjects mentioned in Section 3(b) (the broadcasting system should “strengthen the cultural, political, social and economic fabric of Canada”), and Section 3(d) (programming should “provide reasonably balanced opportunity for the expression of the differing views on matters of public concern” and “should be of high standard”), and held that:

... the Commission might well have concluded that the broadcasting station could not provide “reasonably balanced opportunity for the expression of differing views” unless it granted confidentiality to the person interviewed.<sup>34</sup>

On the further question of the Commission’s power to regulate programming, the Court disagreed with the view expressed by one of the judges in the Ontario Court of Appeal that, in effect, the broadcast policy in Section 3 of the *Act* that programming be of high standard should be confined to the actual words that go out over the air in a specific program. The Court adopted instead the view of Mr. Justice Brooke in the Ontario Court of Appeal:

In my view the purpose of the impugned Regulation is to prohibit an undesirable broadcasting technique, one which does not reflect the high standard of programming which the Commission must, by Regulation of licensees, endeavour to maintain.<sup>35</sup>

The Court went on to say:

That ‘an undesirable broadcasting technique’ may well affect the high standard of programming is, I think, self-evident. ... the word ‘programming’ extends to more than the mere words that go out over the air but the total process of gathering, assembling and putting out the programs generally which is covered by the requirement of the high standard of programming. The Commission might well have concluded that the enactment of Section 5(k) was necessary to prevent development of programming which was the opposite of “high standard”.<sup>36</sup>

The Court held that the Regulation could also be passed under the general power given to the Commission under Section 16(1)(b)(ix) as being “necessary for the furtherance of its objects”.

This rather painstaking review of the decision of the Supreme Court of Canada has been necessary in order to appreciate the length and breadth of the Commission's power to make Regulations and in order to understand how enforceable may be new Regulations recently passed by the Commission.

On October 2, 1984, after two years of publishing and amending its proposals and obtaining public comment, the Commission enacted its first complete pay television Regulations and the following Regulations concerning abusive radio and television programming, in substitution for the Regulations previously in effect:

Regulation 5(1)(b) (A.M. Broadcasting)<sup>37</sup> and Regulation 6(1)(b) (F.M. Broadcasting):<sup>38</sup>

Any abusive comment which, when taken in context, tends or is likely to expose an individual or group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The equivalent in the new Regulation for Television Broadcasting is:<sup>39</sup>

6(1)(b): Any abusive comment or abusive pictorial representation which, when taken in context, tends or is likely to expose an individual or group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The new Regulations for Pay Television Broadcasting<sup>40</sup> are as follows:

6. A licensee shall not distribute in its programming any abusive comment or abusive pictorial representation that, when taken in context, tends or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

7. Where a program to be distributed by a licensee is not suitable for an audience other than an adult audience by reason of its subject matter or treatment thereof, or any characteristic thereof, including its depiction of violence, nudity or explicit sexual conduct, or by reason of coarse language or other content likely to be offensive to some viewers, the licensee shall so advise by providing an appropriate indication thereof at the beginning, and in all promotion of the programming.

We note that when the Commission first published its proposals for pay television Regulations in November, 1982, the proposals did not contain the Regulations that are set out above. These Regulations were first proposed in July, 1984, because of, as the chairman has put it:

...the concerns [that were] raised by many groups, individuals, and organizations with regard to the need to include in [the] Regulations a prohibition against abusive programming on the basis of gender.

While the Regulations against abusive comment or representation are the same for pay television as they are for radio and television broadcasting, there is otherwise a qualitative difference between them. The latter Regulations still prohibit the broadcast of "anything contrary to law" (5(1)(a) and 6(i)(a)) and "any obscene, indecent or profane language pictorial representation" (5(1)(c) and 6(i)(c)). The pay television Regulations contain no such provisions.



The pay television Regulation 7 set forth above is unique to pay television and is not found in the Regulations for other television or radio broadcasting. The policy of Regulation 7 is to allow material for an adult audience to be shown providing a warning is given, rather than to prohibit the kind of representations that would be proscribed in the public media.

In terms of the enforceability of the new Regulations, it is important to remember that Bill C-20 will amend the class of subjects referred to in section 3 by adding paragraph c.1 (*supra*). Should the amendment be enacted, there would seem to be little doubt about the validity and enforceability of the new Regulations.

As the chairman of the CRTC said in a statement to the Sub-Committee of the Standing Committee on Communications and Culture on May 9, 1984:

With regard to amendments to the *Broadcasting Act*, we are aware that the [then] Minister of Communications may take to Cabinet a proposal to amend section 3 to include gender as a group protected from abusive programming. Should the new proposal become law, it would have the effect of giving the Commission a more precise jurisdictional basis, first, to make or amend Regulations prohibiting abusive programming, and second, to press broadcasters with respect to their responsibilities in this area at licence renewal time.<sup>41</sup>

A very significant aspect of the amendment is the requirement that the programming provided by the Canadian broadcast system should not only respect but *promote* equality and dignity. It remains to be seen how the Commission will ensure the promotion of equality and dignity in the system.

## 2.3 Self-Regulation

The Commission has been active in its examination of sex-role stereotyping in broadcasting. The task force established by the CRTC published its report, *Images of Women*, in the fall of 1982. The Task Force was composed of members of the public, the advertising and the broadcasting industries and representatives of the CBC and the CRTC. The recommendations of the Task Force were that the methods of dealing with sex-role stereotyping should be self-regulation with public accountability. The two-year period of self-regulation ended in the Fall of 1984. During this period the Commission did the following:

- (i) the report, *Images of Women*, was widely circulated;
- (ii) the self-regulatory committees of the industry and the CBC were required to submit three reports to outline measures taken to deal with sexual stereotyping. The reports described what steps had been taken for processing complaints, for self-education on the problem and actions to comply with guidelines;
- (iii) every broadcaster in Canada was required in the Fall of 1984 to submit an individual report on what action had been taken to deal with the problem at their station;



(iv) communications from the public on sexual stereotyping and pornography were tabulated and analyzed by the Commission. Over 15,000 such letters had been received by the Commission;

(v) a research company, Erin Research Inc. has been asked by the Commission to analyze program content and to measure compliance to industry guidelines concerning sexual stereotyping. The Company's work will also include monitoring pay television for sex-role stereotyping in commissioned programming and violence in acquired programming.

It is expected that the report of Erin Research Inc. will be received by the Commission in the Spring of 1985. The Commission has indicated that it will then publish a paper containing the results and will sponsor public discussions on the issues.

On January 17, 1985 the Commission announced that it had accepted the final version of Programming Standards and Practices prepared by the pay television licensees. The final version of the Standards and Practices emerged after public comment on the original version published in February, 1984 and after a meeting between the Commission and the licensees. The pay television licensees have established an industry committee to implement the guidelines and to deal with complaints. The Commission will receive periodic reports on complaints and will review the Standards and Practices in early 1986.

It seems clear that the Commission has decided that self-regulation by the industry will be the best method of ensuring compliance with Pay Television Regulation 7.

The Standards and Practices acknowledge that the pay television licensees "have a responsibility to ensure that the programming they provide is of high quality and meets general community standards within the context of a discretionary service". All programs are to be rated, no x-rated films will be shown and all material will be fully screened prior to airing. The following additional aspects of the Standards and Practices are worth noting:

#### *4. Basis of Discretion*

The discretion of programming personnel will be exercised responsibly and in good taste. In particular, no material will be selected that is

- (a) contrary to law, including the *Broadcasting Act* and CRTC Regulations; or
- (b) offensive to general community standards.

"Community standards" will necessarily change over time and therefore will be subject to continuing review and evaluation. Pay television licensees will not select programming that would go beyond an "R-rating" or its equivalent.

Under the section referred to as "Classification and Cautionary Warnings", the Standards and Practices provide for the publication and distribution of a program guide to advise of the classifications of programming. There is also provision for a cautionary warning on-the-air at the beginning of programs. The following classifications will be used:

*First Choice and Superchannel:*

*G:* Suitable for viewing by a general audience of all ages;

*PG:* Parental Guidance suggested. Some material may not be suitable for children;

*A:* Parents are strongly cautioned that some material may be unsuitable for children and young teenagers. Discretion is advised;

*R:* Contains material that is recommended for adult viewing only.

*Super Ecran:* Tous-for all  
14 and over  
18 and over.

There are provisions requiring licensees to “exercise particular care” with respect to programming during family viewing periods and requiring licensees to schedule sexually explicit and/or violent material in the late evening or early morning hours only. These guidelines are to be reviewed by the Commission after one year for “adequacy”.

## 2.4 Criminal Sanctions

The sanctions contained in the *Criminal Code* and the *Broadcasting Act* are available to the Commission and law enforcement authorities as a further method of dealing with program content.

Although Section 159(1) and 159(2)(a) of the *Criminal Code* contain provisions that could result in a prosecution being brought against a radio or television broadcaster for publishing, distributing, circulating or exposing to public view any obscene picture or phonograph record, it is much more likely that criminal proceedings would be taken under the *Broadcasting Act*.

It contains significant criminal sanctions. Licensees who violate the provisions of any Regulation applicable to their licence commit an offence under the *Act*, punishable on summary conviction by a fine not exceeding \$25,000 for a first offence and \$50,000 for each subsequent offence.<sup>42</sup> Anyone who operates a broadcasting undertaking as part of a network and breaches conditions of licence, or who carries on a broadcasting undertaking without a valid or subsisting licence, is guilty of an offence and is liable on summary conviction to a fine not exceeding \$1,000 for each day that the offence continues.<sup>43</sup>

Where there has been an alleged breach of Regulation, the Commission’s practise has been to proceed according to the seriousness of the allegation. If the matter is very serious, the Commission will start its own proceedings to put the broadcasting licence at risk.

If the matter is less serious, the Commission will have the licensee prosecuted for an offence under the *Act*.

It should be noted that the charge that could result from a breach of a condition of licence is only available in the case of a licensee operating as part of a network.

## 2.5 Complaints Procedure

Because the Commission has neither the resources nor the legislative mandate to closely and consistently monitor on-air programming, it depends on members of the public to bring to its attention incidents which may offend the *Broadcasting Act* or Regulations.

Typically, the Commission receives complaints from individuals, groups, competitors of a licensee and sometimes from governments. The Commission's policy upon receipt of a complaint is to immediately advise the licensee of its contents. The licensee is invited to respond to the substance of the complaint. About 80% of the complaints are resolved by the licensee agreeing with the substance of the complaint and making the necessary adjustment in its operations.

In the remainder of the cases, the Commission will advise the complainant of the licensee's response and do what it appropriately can to resolve the matter based on an understanding of the respective positions. Licensees are obliged to keep a recording of all broadcasts for at least 30 days. If a complaint concerns program content, either generally or specifically, the Commission can ask a licensee to provide the appropriate tape.

The Commission adopts a range of actions to handle complaints: it may require the licensee to attend a special meeting to discuss the complaint, or, if the issue does not appear to be urgent, it may decide that the substance of the complaint should be discussed on the next planned and regular occasion when the Commission meets with the licensee.

The Commission may, if the Executive Committee is convinced that it is in the public interest to do so, hold a public hearing in connection with a complaint.<sup>44</sup>

The Commission can also simply proceed to have the licensee charged with an offence under the *Broadcasting Act* for either a breach of the Regulations or the conditions of licence.

The Commission has, in fact, held infrequent public hearings as a result of complaints about its licensees. The public does, however, have a variety of opportunities to advise the Commission about its reaction to the conduct of licensees.

The CRTC has been active in holding hearings in various parts of Canada. These hearings obviously have predetermined agendas, but the Commission has been prepared to hear as additions to its agenda, special representations from members of the public concerning the performance of licensees in the area. The



Commission has also said it is eager to receive any written comments from members of the public on any issue involving the broadcasting system generally or any issue involving specific licensees.

At the time a licence is renewed, the public can intervene to oppose the renewal or to seek to impose conditions of licence or requirements on the licensee. At the present time, the Commission cannot issue licences for more than five years.<sup>45</sup> Under the proposals contained in Bill C-20 the maximum licence period will increase to seven years.<sup>46</sup> So, it must be said that the opportunity for the public to comment about a licensee's performance at licence renewal hearings will lessen if the amendment passes and the Commission acts on the amendment.

The Commission must hold a public hearing if it has in mind the revocation or suspension of licence.

The Commission has never actually ordered the suspension of a licence. It has, however, ordered the revocation of licences for breach of conditions of licence. The Commission has yet to revoke a licence on the basis of program content, but it has issued a variety of "public notices" spelling out its views on a host of matters, such as fairness in news reporting, the "right to respond" and the need to be free of "demeaning comments [and] incitement to violence toward any identifiable group".

It must be remembered by those who think the Commission has not acted harshly enough in imposing sanctions on licensees, that to suspend or cancel a broadcast licence has the result of withdrawing service to an innocent audience. It is, therefore, understandable that the Commission has decided to regulate in an atmosphere designed to process complaints quickly and to carefully monitor a licensee's responses to complaints before the situation becomes acute. There is nothing to suggest, however, that the Commission will not impose ultimate sanctions if faced with continuing breaches of its Regulations or conditions of licence.

### 3. The Reception and Distribution of Satellite Signals

While the CRTC regulates the Canadian broadcasting system, it cannot regulate broadcasting or telecommunication signals emanating from outside Canada. There are many thousands of satellite dishes in Canada that receive signals transmitted from other countries throughout the world. The reception of satellite programming is particularly important in remote parts of Northern Canada where conventional broadcasting service is not available. It is estimated that at least 1,000 satellite channels will be available to be received in Canada by 1986.

Pornographic material is transmitted by satellite signal. The signals are received directly and by and large are not scrambled and unscrambled from satellite. The Committee heard of instances where pornographic material was

seen by unsupervised children at unpredictable hours of the broadcast day. We were also told of pornographic programming providing recreational entertainment in remote work places.

We have no comprehensive idea of the full extent to which pornographic material is available by satellite. We do know, however, that it is available and that it is subject to no form of present control or regulation. Obviously, any initiative taken by Canada will have to be at least bilateral and more appropriately multilateral.

Canada and the United States reached agreement in November, 1972 on the provision of telecommunication services by carriers who operate domestic satellite systems in the two countries and updated the agreement by the exchange of diplomatic letters on August 24, 1982. However, no such agreement has been reached regarding broadcast programming. Indeed, the recent exchange of diplomatic letters confirms that nothing in them, shall

derogate from the authority of [the] respective governments and regulatory authorities to authorize and regulate the reception and distribution in their own country of radio and television programming services originating in the other country and carried on a fixed satellite service.

Given the concerns we have heard expressed by those who have had experience with the pornographic programming available by satellite reception, it is surprising that there has not been an official expression of similar concern between Canada and the United States about such transborder program content.

There is an important distinction to be made between the *reception* of a satellite signal and the *distribution or redistribution* of that same signal. At the moment, the CRTC has no jurisdiction in either area.

As far as we are aware, based on information given to us at the public hearings and from the CRTC, it appears that there are two typical situations in which individuals and companies receive broadcast signals by satellite dish or antenna and then either redistribute or distribute the same signal: firstly, those who redistribute the signal by cable network to subscribers, and secondly, hotels, apartment buildings or condominiums which receive the signal and distribute it within their premises.

The provisions of Bill C-20 would give the CRTC the power to licence and regulate the first situation but not the second.

To accomplish this result, Bill C-20 adds to section 2 of the *Broadcasting Act* a section that provides that any person who,

...transmits or distributes by means of telecommunication, otherwise than solely as a telecommunication common carrier and whether or not for any consideration, any programming received by radio-communication is deemed to be carrying on a broadcasting undertaking.<sup>47</sup>

When Bill C-20 was introduced, the Minister of Communications asked the CRTC to assist the Department and the Government in the implementa-



tion of its policy approach. The CRTC has responded by establishing a Task Force to examine and make recommendations on the distribution in underserved Canadian communities of satellite-received broadcasting services. It was expected that the Task Force's work would be completed by mid-February, 1985 and that its report would be received shortly thereafter.

In asking for the Commission's assistance, the Minister made the following point:

In order to preserve the integrity of the broadcasting system, the continued distribution of unauthorized American specialty services, without payment to the program originators, cannot be permitted.<sup>48</sup>

The suggestion implicit in the comment is the investigation of some system that would require the originator's consent before a program could be received by satellite antenna. In this connection, the Chairman of the CRTC made the following answer when asked by a Member of Parliament what recommendations he had with respect to suitable international controls or regulation of satellite broadcasting:

...to answer your question I will probably have to look at a broader picture than only the question of pornography on satellites. I would think — and it is my personal view...the best thing that could happen to protect the artists, to make sure we do not have pornography available everywhere in Canada, or everywhere in the world — I do not think an international agreement would be easy to reach on that. I think the only means would be to try to convince people that they have some interest in scrambling their signal. If the owners of those signals were convinced of that, that they should scramble their signal, you would have a chance to control who gets it and who does not get it. I think it would probably be a more practical way of controlling that.

I would imagine a lot of countries would resist the idea of trying to put some kind of limitation on what could be on their satellites. They are not all organized as we are here, and their [regulatory bodies] do not all have the same kind of responsibility that we have here with the CRTC.

But I think if you look at the copyright problem, if you look at the commercialization of those services, you will find enough justification there to sell the idea that those services — that all services on satellites should be scrambled in one way or the other. It could be a very sophisticated means, or it could be a more simple one, but if we could get that, I think it would solve a lot of these problems, including the question of pornography.

The approach suggested by the Chairman of the CRTC has practical validity. If the originators of the signals can be convinced to scramble their signals, only subscribers with descramblers will be able to receive them. Such a system could be reinforced by the domestic law making it an offence to receive a signal that has not been purchased or which has been obtained without the consent of the originator.

The important question of whether the program content transmitted by satellite should be controlled remains open along with the questions of who should exercise control and under what circumstances.



## 4. Bill C-20

A significant aspect of the proposed amendments to the *Canadian Radio-Television and Telecommunications Act* in Bill C-20 is the expanded power it will give to the Governor in Council to provide "direction" to the CRTC.

The Minister of Communications said in the House in the course of introducing the Bill:

Part I of the bill amends the CRTC Act to enable the Governor in Council to give binding policy directions. Those directions would be laid before Parliament and it would have the opportunity to take them under advisement before they are formally put into effect.

Although the 1968 legislation setting up the CRTC did not generally grant that power to the government, I think it is necessary today to specify that the government and not the CRTC should develop the broadcasting and telecommunications policies. That position is supported by the provinces, the industry and the Commission itself. Moreover, it was ratified by the Lambert Commission and one of its specific recommendations was as follows:

The constituent act of Independent Deciding and Advisory Bodies contain provisions allowing for policy directives from the Governor in Council.

This principle was also supported in 1980 by a special parliamentary committee of the House of Commons on Regulatory Reform as follows:

— that Cabinet can issue binding policy directives...to the Canadian Radio-Television and Telecommunications Commission.

The relation between the government and the Commission has been under review for many years. If there is an aspect of the review that public debate has brought out, it is that the government should be responsible for the drawing up of policy and that the CRTC should be in charge of its implementation within the legislative framework set up by Parliament. The division of powers between the government and the Canadian Radio-Television and Telecommunications Commission reflects the democratic principle that the government alone is entitled to develop the main policies of the country because of its accountability to the electorate through Parliament.

The government having the power to give formal directions to the CRTC, will implement its policy in the telecommunication and broadcasting areas. If it did not have that power, it could have no influence on the development of policy and consequently could not be called to account. As in the present legislation, it could only react after the fact and ask for reconsideration of specific decisions made by the CRTC.<sup>49</sup>

At the present time, the Governor in Council may give directions to the Commission only with respect to any conditions of licence to the CBC (section 17(3)), requiring all licensees to broadcast a program deemed to be of urgent importance to some or all Canadians (section 18(2)), or the maximum number and reservation of channels or frequencies within a designated geographical area, or the actual classes of applicants to whom licences may be issued, amended or renewed (section 22(1)(a)).

The amendments are, therefore, very significant and will likely have a fundamental effect on the Commission's work. Of course, because the Commission's objects have always been to implement broadcast policy as expressed in section 3 of the *Broadcast Act*, Parliament has always had the power to determine the CRTC's policy direction. But the effect of the proposed amendments will be to give to the Cabinet the specific power to give binding policy directions. The only exception is with respect to "the issuance of a broadcasting licence to a particular person or the amendment or renewal of a particular broadcasting licence" (section 1 adding section 14.2 to the *CRTC Act*). The Commission's power remains exclusive in this sensitive area.

The Bill provides that the Minister shall consult with the Executive Committee of the CRTC, "with respect to the nature and subject matter of the direction or notice" (section 1 adding section 14.5 to the *CRTC Act*) and the Cabinet direction must be laid before Parliament, "unless the direction requires only that the Commission hold hearings or make reports on any matter" (section 1 adding section 14.4 to the *CRTC Act*). The Commission cannot act on any direction until 30 days after the direction has been laid before both Houses of Parliament (section 1 adding section 14.2 to the *CRTC Act*).

There can be no doubt that under the amendments, virtually all aspects of the Commission's work are potentially the subject of Cabinet direction. Given the requirement that directions must be laid before Parliament, it is clear that the regulation provided by the CRTC will come under increased public scrutiny. It may well be that, as a result, the policies pursued by the Commission will be more responsive to the public mood and more easily changed. In the terms of program content, it remains to be seen whether, over time, the new technique of issuing policy directions will succeed.

The Cabinet could conceivably direct the Commission with respect to the conditions of licence, the substance of program content regulations, and even the suspension or revocation of a licence. It will be for the Cabinet and the CRTC to determine how the always delicate balance between the executive branch and the regulating agency is to be effectively managed.

## Footnotes

- <sup>1</sup> *The Broadcasting Act*, S.C. 1967-8, c.25, s.2.
- <sup>2</sup> *Ibid.*
- <sup>3</sup> *Ibid.*, s.3(f).
- <sup>4</sup> *Ibid.*, s.3(g).
- <sup>5</sup> *The Canadian Radio-Television and Telecommunications Commission Act*, S.C. 1975, c.49.
- <sup>6</sup> *The Broadcasting Act*, S.C. 1967-8, c.25, s.16.
- <sup>7</sup> *Ibid.*, s.5.
- <sup>8</sup> *Ibid.*, s.8.
- <sup>9</sup> *Ibid.*, s.14.
- <sup>10</sup> *Ibid.*, s.17.
- <sup>11</sup> *Ibid.*, s.16(1)(c).
- <sup>12</sup> *Ibid.*, s.19(1).
- <sup>13</sup> *Ibid.*, s.19(2).
- <sup>14</sup> *Ibid.*, s.19(7).
- <sup>15</sup> *Ibid.*, s.21.
- <sup>16</sup> *Ibid.*, ss.26(1) and (5). The appeal can only be brought with leave of the Federal Court of Appeal. Application for leave must be made within one month of the making of the decision under appeal.
- <sup>17</sup> *Ibid.*, s.23(1).
- <sup>18</sup> *Ibid.*, s.23(3).
- <sup>19</sup> *Ibid.*, s.23(4).
- <sup>20</sup> *Ibid.*, s.24.
- <sup>21</sup> *Ibid.*, s.31.
- <sup>22</sup> (1971), F.C.R. 498, at 513.
- <sup>23</sup> House of Commons, Hansard: 31 Jan. 1985, at 1848.
- <sup>24</sup> *The Broadcasting Act*, S.C. 1967-8, c.25, s.17(1)(2).
- <sup>25</sup> Transcript of Minutes of Proceedings, at 4-6.
- <sup>26</sup> *The Broadcasting Act*, S.C. 1967-8, c.25, ss. 16(1)(b)(i), 16(1)(b)(ix).
- <sup>27</sup> CRC, Vol. IV, c.379, at 2559 (Regulation 5) and CRC, Vol. IV, c.380, at 2582 (Regulation 6).
- <sup>28</sup> CRC, Vol. IV, c.381, at 2606.
- <sup>29</sup> *R. v. Buffalo Broadcasting Co. Ltd.* (1977), 36 C.P.R. (2d) 170 (Sask. Prov. Ct.).
- <sup>30</sup> *R. v. C.K.O.Y.* (1978), 90 D.L.R. (3d) 1 (S.C.C.).
- <sup>31</sup> *Ibid.*, at 9.
- <sup>32</sup> *Ibid.*, quoting from Evans, J.A., 70 D.L.R. (3d) 662, at 667.
- <sup>33</sup> *Ibid.*,
- <sup>34</sup> *Ibid.*, at 10.
- <sup>35</sup> *Ibid.*, quoting from Brooke J.A., 70 D.L.R. 662, at 672.
- <sup>36</sup> *Ibid.*,
- <sup>37</sup> SOR/84-786.
- <sup>38</sup> SOR/84-787.



<sup>39</sup> SOR/84-788.

<sup>40</sup> SOR/84-797.

<sup>41</sup> Transcript of Minutes of Proceedings, at 417.

<sup>42</sup> *The Broadcasting Act*, S.C. 1967-8, c.25, s.29(1).

<sup>43</sup> *Ibid.*, s.29(3).

<sup>44</sup> *Ibid.*, *The Broadcasting Act*, S.C. 1967-8, c.25, s.19(2)(c).

<sup>45</sup> *Ibid.*, s.17.

<sup>46</sup> Bill C-20, 30th Parl., 3rd Sess., 1977, Part II, s.5.

<sup>47</sup> *Ibid.*, s.2.

<sup>48</sup> Excerpts from a letter released by the Department of Communications to the CRTC on December 20, 1984.

<sup>49</sup> House of Commons, Hansard: 31 Jan. 1985, at 1847.



## Chapter 13

# Human Rights

There now exists in Canadian human rights legislation and jurisprudence some attempt to deal with pornography as a human rights or “hate propaganda” issue.

Most *Codes* contain prohibitions against discrimination in employment or in access to services or facilities available to the public. Human rights jurisprudence has developed to the point of holding that the creation in the workplace of an atmosphere of harassment based, say, on race is a form of discrimination.<sup>1</sup>

The same jurisprudence was extended to sexual harassment.<sup>2</sup> Now, in some *Codes*, there are explicit formulations of a prohibition against racial or sexual harassment. An excellent example of this type of provision is that found in the *Canadian Human Rights Act*.<sup>3</sup> Section 13.1 of that *Act* provides:

- (1) It is a discriminatory practice,
  - (a) in the provision of goods, services, facilities or accommodation customarily available to the general public,
  - (b) in the provision of commercial premises or residential accommodation, or
  - (c) in matters related to employment,

to harass an individual on a prohibited ground of discrimination.

(2) Without limiting the generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.

Accordingly, complaints by women that pornography is an oppressive presence in their place of employment could be investigated by human rights commissions either as a complaint of sex discrimination on the “atmosphere of harassment” principle, or, under specific rules about sexual harassment where these are available. Indeed, many employers and unions may now be addressing the issue of pornography in the workplace as part of sexual harassment policies developed in response to human rights legislation. In the 1984 decision of the Canadian Human Rights Tribunal dealing with allegations of sex-based discrimination by Canadian National Railways, specific mention was made of



the success of the in-house policy on sexual harassment in clearing up women's complaints about pornography in the workplace.<sup>5</sup>

There have been no reported cases dealing with pornography as discrimination in the educational setting or in public facilities. However, it seems that the jurisprudence developing the idea that pornography can create a discriminatory atmosphere may be applicable in this sphere too. The presence of pornographic materials in a store to which the public has access may, arguably, create a different access to that facility for women and for men. It may be that such a distinction could give rise to a successful complaint. The same reasoning might also extend to educational facilities.

We consider it desirable for human rights commissions themselves to review this issue, and to formulate the same kinds of guidelines with respect to sexual harassment in services and facilities as many of them have with regard to sexual harassment in employment.

The *Saskatchewan Human Rights Code*<sup>6</sup> provides in subsection 14(1) that:

14. (1) No person shall publish or display or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device or in any printed matter or publication or by means of any other medium that he owns, controls, distributes or sells, any notice, sign, symbol, emblem or other representation tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons of any right to which he is or they are entitled under the law, or which exposes, or tends to expose, to hatred, ridicules, belittles, or otherwise affronts the dignity of any person, any class of persons or a group of persons because of his or their race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin.

In 1980 a complaint was filed with the Saskatchewan Human Rights Commission against the University of Saskatchewan Engineering Students' Society, alleging that an issue of the student publication *Red Eye* contained representations of women which ridiculed, belittled and otherwise affronted the dignity of women in Saskatchewan. Investigation by the Commission led to such allegations being brought against other issues of the paper. In March, 1984, a Board appointed to hear the complaints ruled that violations of the *Code* had occurred.<sup>7</sup>

The Board concluded after reviewing the newspapers that the form which the "ridicule" took "frequently involved material containing the allegedly humorous description or depiction of the violent destruction of women's bodies through intercourse".<sup>8</sup> The manner in which women were "belittled" and had their dignity affronted because of their sex was found to involve material suggesting women in educational institutions are less than human; that they are inferior human beings; that they are there to gratify male sexual desires; that they have no independent motivation or capacity to participate in social and intellectual activity. Women were found to have been belittled by being

represented as mere objects, and to have been affronted by the trivializing and deriving of humour from material which promotes sexual violence and the objectification of women.

A defence based on freedom of speech was relied on in the *Red Eye* case. Subsection 14(2) of the *Code* provides that nothing in subsection 14(1) restricts the right to freedom of speech under law upon any subject.

The Board recognized the need to reconcile two competing social interests. One of these is freedom of expression, the other equality. Both are entrenched in the *Charter of Rights*, in sections 2 and 15, respectively. In trying to balance these interests, the Board took as its point of departure the judgment of the Supreme Court of Canada in *Re Alberta Legislation*.<sup>9</sup> Most particularly, it cited the observations of Mr. Justice Duff of that judgment that:

The right of public discussion is of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means to quote the words of Lord Wright in *James v. Commonwealth of Australia* “freedom governed by-law”.<sup>10</sup>

Although it recognized that subsection 14(1) does not prohibit every type of insult to a protected class, and affirmed that great caution must be used before making any determination abridging the free expression of others, the Board concluded that where no redeeming social interest is evident the freedom of expression may be abridged. Where representations infringe upon the rights of others, such as their egalitarian rights, the Board concluded that the right to freedom of speech could be curtailed without infringing Constitutional rights.

The Board gives this exposition of the rationale for its decision, and for the legislation itself:

This material promotes a consistent image of women as less than human. Once a protected class, in this case women, is represented as a less than equal member of the human family with impunity the grave evil exists that they may be treated as such. Material of the kind in these newspapers serves to perpetuate a social climate discriminatory to women who are already targets of manifold discrimination and horrible violence. No social interest is served by tolerating the free expression of such material.<sup>11</sup>

The Board also made the point, often raised in briefs to this Committee, that there would be no doubt that a violation of subsection 14(1) had occurred if race, rather than sex, formed the nexus of the class against whom the offending material was directed.<sup>12</sup>

The Saskatchewan *Human Rights Code* provision is notable because it addresses material which exposes to hatred, ridicules, belittles or otherwise affronts the dignity of any person, group or class of persons. It is thus the broadest of the existing provisions. Interestingly, the complaint in the *Red Eye* case did not allege that the newspaper exposes women to hatred, although the remarks of the Board of Inquiry might have been fitting even if this more serious offence had been alleged.

Human rights legislation at the federal level, and in Manitoba, addresses the narrower issue of hate messages. *The Canadian Human Rights Act* provides, in section 13, that:

(1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

(2) Subsection (1) does not apply in respect of any matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.

(3) For the purposes of this section, no owner or operator of a telecommunication undertaking communicates or causes to be communicated any matter described in subsection (1) by reason only that the facilities of telecommunication undertaking owned or operated by that person are used by other persons for the transmission of such matter.

In section 2 of the *Manitoba Human Rights Act*,<sup>13</sup> we find the following provision:

(1) No person shall

- (a) publish, display, transmit or broadcast, or cause to be published, displayed, transmitted or broadcast; or
- (b) permit to be published, displayed, broadcast or transmitted to the public, on lands or premises, in a newspaper, through television or radio or telephone, or by means of any other medium which he owns or controls;

any notice sign, symbol, emblem or other representation

- (c) indicating discrimination or intention to discriminate against a person; or
- (d) exposing or tending to expose a person to hatred;

because of the race, nationality, religion, colour, sex, marital status, physical or mental handicap, age, source of income, family status, ethnic or national origin of that person.

Interestingly, these provisions in the human rights legislation of Canada, Manitoba and Saskatchewan protect against exposure to hatred on a substantial number of grounds, including "sex". By contrast, the hate message provisions of the *Criminal Code*, found in sections 281.1 and 281.2, protect identifiable groups distinguished only by colour, race, religion or ethnic origin.

Two jurisdictions confer rights of action on groups or members of groups in the case of incitement to hatred or similar harms. The *Manitoba Defamation Act*<sup>14</sup> provides in subsection 19(1) that:

(1) The publication of a libel against a race or religious creed likely to expose persons belonging to the race, or professing the religious creed, to hatred, contempt or ridicule, and tending to raise unrest or disorder among the people, entitles a person belonging to the race, or professing the religious



creed, to sue for an injunction to prevent the continuation and circulation of the libel; and the Court of Queen's Bench may entertain the action.

The action may be brought against the person responsible for the authorship, publication, or circulation of the libel. Subsection 19(4) provides that no more than one action shall be brought in respect of the same libel.

The British Columbia *Civil Rights Protection Act, 1981*,<sup>15</sup> confers fairly extensive rights to sue for remedies against persons who commit a prohibited act.

In subsection 1(1) of the *Act*, "prohibited act" is defined as:

any conduct or communication by a person that has as its purpose interference with the civil rights of a person or class of persons by promoting

- (a) hatred or contempt of a person or class of persons, or
- (b) the superiority or inferiority of a person or class of persons in comparison with another or others,

on the basis of colour, race, ethnic origin or place of origin.

The *Act* provides in subsection 1(2) that a prohibited act is a civil wrong (tort) that can be the subject of a claim by a person or class of person against whom the prohibited act was directed, without the necessity of the complainant proving that any actual damage was suffered. Section 3 of the *Act* allows the Court to award damages and an injunction in appropriate cases.

The *Act* also provides that the Attorney General may intervene in an action under section 1. A person bringing such an action is required to serve the Attorney General with notice of the action, presumably to permit him or her to decide whether to intervene.

This legislation was passed in 1981, after a problem had arisen in the province concerning the activities of the Ku Klux Klan. A *Report Arising out of the Activities of The Ku Klux Klan in British Columbia* prepared in 1981 by lawyer John McAlpine, Q.C., had recommended amendment of the British Columbia *Human Rights Code* to permit the Human Rights Commission to handle complaints of hate messages. Interestingly, the report specifically stated that they were not recommending legislation to encompass messages based on sex or marital status. The reason for refraining from such a recommendation was quite specific: Mr. McAlpine's appointment arose as a consequence of a concern of minority groups with the Klan message on the basis of race, religion and ethnic origin. He identified these forms of discrimination as "actual and threatening" and thus warranting remedial legislation.<sup>16</sup> The Report recognized, however, that there might be a need to expand the protection in the future should the messages of the Klan reach out to encompass other groups.

Although the form of legislative action which eventually was proceeded with in British Columbia differed from that recommended in the McAlpine Report, this glimpse of Mr. McAlpine's reasoning for specifying that these particular grounds alone be protected is an interesting one. Consider that the

amendments which introduced section 13 of the *Canadian Human Rights Act* came in response to anxiety about the activities of an anti-Zionist producer of telephone hate messages in Toronto, and that the provisions of the *Criminal Code* themselves were enacted following concern over hate propaganda being disseminated about particular religious and racial groups. Upon such consideration, one sees that the possible relevance of such provisions to hate messages involving other groups, like women, was not uppermost in the minds of the proponents of this legislation. Arising out of an immediate situation, it dealt only with that situation. There has not, to our knowledge, been a principled discussion, and rejection, of the idea of extending this legislation to protect against messages aimed at women.

There have, however, been general considerations in recent years of measures directed against hate messages. In 1984, a report on *Group Defamation* prepared for the Attorney General of Ontario by Patrick Lawlor, proposed that the Ontario *Human Rights Code* be amended to permit a remedy for persons and groups who are exposed to hatred. Mr. Lawlor chose the *Human Rights Code* as the repository for this remedy because he considered that its tenor and temper best accords with the nature of the evil to be remedied, which he described as psychic and spiritual blows, no less traumatic because relatively intangible.<sup>17</sup> The Ontario government has not proceeded with any amendment to the *Code* in this area.

*Equality Now!*, the Report of the Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society, released in 1984, addressed a number of recommendations to the question of remedies for hate messages. One of the central features of these recommendations was a push for improvement of the existing *Criminal Code* provisions about hate messages. However, the Committee also made a number of suggestions for improvements and extensions of human rights treatment of this problem.

The Committee proposed in Recommendation 38 that the *Canadian Human Rights Act* be amended to allow the Canadian Human Rights Commission to deal with hate propaganda. The Committee referred to this approach as "more timely and less cumbersome" than some other methods of dealing with hate literature, particularly than the *Criminal Code* route. The Committee pointed out that Commission handling of complaints means that the need of the complainant for a lawyer, and "other legal requirements involved in an ordinary prosecution", will be eliminated.<sup>18</sup>

Interestingly, however, the Committee also records the complaints of witnesses before it that once a complaint has been lodged with the Human Rights Commission, they lose control of how it is processed. This, according to the witnesses, often results in lengthy delays between the filing of the complaint and its final resolution. Accordingly, Recommendation 43 of the Committee urges the federal and provincial governments to amend their anti-discrimination laws to allow a complainant the option of instituting civil litigation against a discriminator rather than making a complaint to Human Rights Commission.<sup>19</sup>

Neither the Lawlor Report nor *Equality Now!* addresses the issue of hate messages against women, or, specifically, pornography. It appears to us as if the interest in using hate message remedies to address pornography arose well after the interest in hate literature protections against racial and religious minorities had been put on the social agenda. The interest in the human rights, or hate literature, approach to pornography has in great measure arisen from the work of two American thinkers, Catharine MacKinnon and Andrea Dworkin. This work has generated considerable enthusiasm in Canada, and was referred to often by persons appearing at the public hearings. In Section IV, Chapter 25, we examine the implications of this approach for Canadian law, and discuss the extent to which we believe it should be adopted.



## Footnotes

- <sup>1</sup> In *Simms v. Ford of Canada* 4 June 1980 (Ontario Human Rights Code Board of Inquiry), unreported, Professor Krever, as he then was, wrote that "discriminate" includes making the employee's working conditions different from those under which other employees work. He stated that to permit a black employee in a plant where the majority of the employees are white to be humiliated repeatedly by insulting language relating to his colour would be to require him to work under unfavourable conditions which do not apply to white employees.
- <sup>2</sup> Arbitrator Owen Shime in *Re Bell and Korczak* (1980), 27 L.A.C. (2d) 227 (Ontario) gave, at 229, a statement of the rationale for the rule against sexual harassment. Widely accepted by other arbitrators, this observation was that "the forms of prohibited conduct that, in my view, are discriminatory run the gamut from overt gender-based activity, such as coerced intercourse to unsolicited physical contact to persistent propositions to more subtle conduct such as gender-based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment." Arbitrator Katherine Swinton in *Re C.U.P.E. and O.P.E.I.U. Local 491* (1982), 4 L.A.C. (3d) 385 described, at 399, "conditions of work" harassment. As developed by Catharine MacKinnon, this concept means that the work environment becomes unpleasant or unbearable because of a pattern of insults and hostility to women, which is intolerable to the victim. The negative work environment may be the result of either the victim's refusal of a sexual advance, or the attitude of supervisors and co-workers to women.
- <sup>3</sup> *Canadian Human Rights Act*, S.C. 1976-77, c.33, as amended by S.C. 1977-78, c.22, s.5; S.C. 1980-81, c.54, Schedule; S.C. 1980-81-82, c.111, Schedule IV, s.2; S.C. 1980-81-82-83, c.143; and S.C. 1983-84, c.21, ss. 73 and 74.
- <sup>4</sup> Enacted by S.C. 1980-81-82-83, c.143, s.7.
- <sup>5</sup> *Action Travail des Femmes v. Canadian National; Canadian Human Rights Commission, Intervenant*, TD 10/84 (August 22, 1984), at 131.
- <sup>6</sup> R.S.S. 1978, c. S-24.1, as amended.
- <sup>7</sup> *Saskatchewan Human Rights Commission v. The Engineering Students' Society, University of Saskatchewan et al*, March 7, 1984 (Red Eye Decision).
- <sup>8</sup> *Red Eye Decision*, at 49.
- <sup>9</sup> [1938] S.C.R. 100.
- <sup>10</sup> Quoted in: *Red Eye Decision* at 25.
- <sup>11</sup> *Ibid.*, at 51-52.
- <sup>12</sup> *Ibid.*, at 23.
- <sup>13</sup> S.M. 1974, c.65.
- <sup>14</sup> R.S.M. 1970, c.60.
- <sup>15</sup> S.B.C. 1981, c.12.
- <sup>16</sup> John D. McAlpine, *Report Arising Out of the Activities of the Ku Klux Klan in British Columbia* (April 30, 1981), at 61.
- <sup>17</sup> Patrick Lawlor, *Group Defamation* (1984), para. 6 at 72.
- <sup>18</sup> Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society, *Equality Now!* (1984, Supply and Services Canada, Ottawa) at 72.
- <sup>19</sup> *Ibid.*, at 72.

## Chapter 14

# Film Classification and Censorship

### 1. Introduction

We have not undertaken either extensive or intensive studies of classification and censor board practices in Canada, because the major focus of our mandate is on the federal level of government. However, the questions of the scope of provincial activity in the regulation of films, and the appropriate stance of the federal criminal law, are closely related to one another. Witnesses at our public hearings commented, often unhappily, about the activities of classification and censor boards, or what was sometimes seen as the lack of activity of such boards.

We have accordingly analyzed the legislation and regulations governing provincial classification and censorship of films, and reviewed the empirical information on selected board activities presented by the Badgley Committee,<sup>1</sup> and by Professor Neil Boyd as part of the Department of Justice research program on pornography and prostitution.<sup>2</sup> We have also had the opportunity to meet with Mary Brown, Director of the Ontario Film Review Board, Mary Louise McCausland, Film Classification Director of British Columbia, and the Director and some members of the Québec Bureau de Surveillance du Cinéma. While the details we have gathered are by no means exhaustive, we think that we have been able to form a clear enough impression of provincial activity to appreciate its significance to any overall effort to deal with offensive material.

The provinces of Nova Scotia, New Brunswick, Québec, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia have legislation providing for regulation of films which are being shown publicly.<sup>3</sup> Some of these schemes apply as well to videotapes which are being shown publicly.<sup>4</sup> Ontario and Nova Scotia have recently included sale and rental of videotapes for private consumption in their regulatory schemes.<sup>5</sup> Newfoundland has passed legislation providing for a film censorship board but the board has not been established;<sup>6</sup> Newfoundland adopts the rules of the New Brunswick Film Classification Board. So, too, does Prince Edward Island.<sup>7</sup>

The Northwest Territories and the Yukon do not have film classification boards. Although the arrangement to do so is relatively informal, these

jurisdictions usually look to the rulings of the Alberta and British Columbia boards, respectively. Sometimes, the rulings of other boards will also be canvassed by Northwest Territories officials.<sup>8</sup>

Typically, provincial legislation providing for film classification establishes an authority to which all films intended for exhibition in the province must be submitted. Theatre owners are forbidden from exhibiting a film which has not been reviewed and classified, and from altering a film after it has been reviewed and classified. Similarly, in most jurisdictions, there is a prohibition against an operator altering a classification once it has been bestowed by the board.

## 2. Banning or Prohibiting Films

Most of the provincial legislation in this field authorizes the film boards to prohibit as well as to regulate the display of films in the province. The legislation of Nova Scotia, New Brunswick, Ontario, Alberta, Saskatchewan and British Columbia includes this power to prohibit showing of a film.<sup>9</sup> In a case involving the Nova Scotia Board of Censors, predecessor to the present Amusements Regulation Board, the Supreme Court of Canada held in a five to four decision that the provinces do have the constitutional authority to permit these authorities to prohibit exhibition of films.<sup>10</sup>

In most of the provinces which feature a power to prohibit the showing of films, the legislation does not contain any standards upon which the reviewing authority is to make the decision whether to ban the film. The exception is Ontario. Subsection 35(2) of the *Theatres Act*, enacted in 1984,<sup>11</sup> provides that the Ontario Film Review Board may refuse to approve a film for distribution or exhibition in Ontario "in accordance with the criteria prescribed in the Regulations". Subsection 35(3) adds that the Board may make its approval conditional on the film being exhibited on specified dates in designated locations only.

In the Ontario Regulation, it is provided that after viewing a film, the Board may refuse to approve it for exhibition or distribution in Ontario where the film contains:

- (a) a graphic or prolonged scene of violence, torture, crime, cruelty, horror or human degradation;
- (b) the depiction of the physical abuse or humiliation of human beings for purposes of sexual gratification or as pleasing to the victim;
- (c) a scene where a person who is or is intended to represent a person under the age of 16 years appears,
  - (i) nude or partially nude in a sexually suggestive context, or
  - (ii) in a scene of explicit sexual activity;
- (d) the explicit and gratuitous depiction of urination, defecation or vomiting;
- (e) the explicit depiction of sexual activity;



- (f) a scene depicting indignities to the human body in an explicit manner;
- (g) a scene where there is undue emphasis on human genital organs; or
- (h) a scene where an animal has been abused in the making of the film.<sup>12</sup>

Sexual activity means acts, whether real or simulated, of intercourse or masturbation, and includes the depiction of genital, anal or oral-genital connection between human beings or human beings and animals, and anal or genital connection between human beings by means of objects.<sup>13</sup>

Subsection 21(1) of the new Regulation states that in exercising its authority to prohibit the exhibition of films, the Board shall consider the film in its entirety and take into account the general character and integrity of the film.

These features of the Ontario legislation were introduced following a successful challenge to the former provisions under the *Canadian Charter of Rights and Freedoms*.<sup>14</sup> Subsection 3(2)(a) of the *Theatres Act* had simply provided that the Board of Censors, as it was then known, had power to censor any film, and subsection 3(2)(b) provided that, subject to the regulations, it could approve, prohibit, or regulate the exhibition of any film in Ontario. There were no regulations setting out what would cause a film to be banned in the province, although the Board had published informal guidelines stating its criteria. The Ontario Court of Appeal held that the power to censor and prohibit was a restriction on the right of freedom of expression guaranteed by the *Charter of Rights*. The guidelines, not being embodied in law at all, would not assist the Board in establishing that the restriction on the *Charter* right was, as required by section 1 of the *Charter*, a “reasonable limit prescribed by law.”

The Ontario decision may well have implications for those other provinces that permit the banning of a film in the province without specifying the grounds on which it will be banned.

Two provinces do not permit the banning of films. In Manitoba, the film classification board is authorized only to classify films.<sup>15</sup> The Bureau de Surveillance du Cinéma of Québec is given no express power to prohibit the showing of films.<sup>16</sup>

### 3. Cutting Films

Much of the provincial legislation affecting film classification also permits the reviewing authority to make cuts in films which are submitted for review. In Ontario and Saskatchewan, the board is empowered to remove from the film, any portion that it does not approve of for exhibition or distribution, when authorized to do so by the person submitting the film for approval.<sup>17</sup> A similar proviso exists in British Columbia, but there, the removal of the offending portion is explicitly said to be as a condition of approval of the film for showing.<sup>18</sup>

The Nova Scotia Amusements Regulation Board is given wide powers to authorize the use of any film with "such changes as it may direct".<sup>19</sup> Similar broad power is conferred on the Alberta Board of Censors, which may eliminate any subtitles, words, or scenes that it considers objectionable before the issue of a certificate for the exhibition of the film.<sup>20</sup> We understand, however, from the research of the Badgley Committee, that the Board does not exercise this power to cut films.<sup>21</sup> The New Brunswick Film Classification Board has this wide power in a slightly different guise. It indicates to would-be exhibitors the changes to be made in order to meet the approval of the Board.<sup>22</sup> The act of cutting is thus done by the exhibitor, but the Board's power to insist on cuts is no less broad than in the cases where the board itself cuts, with or without the approval of the exhibitor.

In keeping with its authority only to classify, the Manitoba Film Classification Board has no power to cut films, or to require that they be cut. The Québec Bureau de Surveillance du Cinéma does not possess any explicit power to cut films. It is our understanding that persons wishing to show films in Québec, will sometimes find themselves going back to the copyright holder to request that changes or deletions be made to the film, so that it can be approved for showing in the province. This situation arises because it is forbidden to exhibit a film in the province without a visa from the Director. The visa may be withheld until a version of the film suitable for showing is presented.

It would appear as if the power to cut films is not subject to any standards contained in provincial legislation. In Ontario, the new legislation articulates the standards to be applied when considering whether a film should be prohibited and these same standards may apply to deletions. However, it is not immediately obvious from the Regulation that they do. The omission from the legislation or regulations of standards upon which decisions about cutting shall be made seems to open this aspect of the provincial schemes to the same charge of limiting freedom of expression otherwise than by law.

#### 4. Practices of Selected Boards

Professor Neil Boyd studied the practices of four Canadian boards with respect to prohibiting films from being exhibited, namely those in British Columbia, Ontario, Québec, and Nova Scotia. Included in his review was information about provincial policies on banning films and on the issue of deletions from films. Interestingly, the four boards differed among themselves on the amount of information provided to the public about refusals of permission to exhibit, and about elimination of scenes. Both British Columbia and Ontario publish reports of cuts requested; Nova Scotia and Québec do not. In the case of Québec, the non-publication of such a report is attributed to the review process itself. A film may be refused more than once as part of the overall process of negotiation between distributor and board leading to eventual approval for exhibition. It is considered meaningless to publish statistics of the overall number of refusals, which will not distinguish outright refusals from those which are part of the bargaining.<sup>23</sup>



The standards employed to assess suitability of a film vary from province to province. In Ontario, the Director stated in the 1982-83 annual report of the Theatres Branch that very graphic or prolonged scenes of violence, torture, bloodletting, explicit portrayal of sexual violence, explicit portrayal of sexual activity, undue or prolonged emphasis on genitalia and ill treatment of animals, would normally be considered to contravene community standards. Elimination of such scenes would be requested before exhibition of the film.<sup>24</sup> These items of concern are now, for the most part, embodied in the 1985 Regulation under the *Theatres Act*. One of the Board's major concerns is sexuality and children;<sup>25</sup> its banning of *Pretty Baby* and requirements of cuts to *The Tin Drum* have been centres of controversy in recent years.

In Nova Scotia, the rejection of a film may occur when there is no real story but prolonged explicit portrayal of sexual activity, sexual exploitation of children, undue and prolonged scenes of violence, torture, bloodletting, ill treatment of animals, and undue or prolonged emphasis on genitalia.<sup>26</sup>

In British Columbia, the key variables for film review are penetration, ejaculation and violence. Interestingly, explicit scenes of both fellatio and cunnilingus are permitted by the Board, but scenes involving penetration or ejaculation are prohibited.<sup>27</sup>

Québec authorities regard explicit sexuality between consenting adults as acceptable or tolerable. Unlike British Columbia, Québec allows presentation of films containing penetration or ejaculation. Sexuality, per se, is not a target for elimination, but images of sexual violence are.<sup>28</sup> In recognition of the pluralistic and changing nature of society, the Bureau does not keep in place specific and inflexible criteria. However, it is guided by two principles: judgment is not passed on films according to their themes, but upon the manner in which they are treated; and respect is given to the goals of protecting minors and maintaining freedom of choice for persons 18 years of age or older.<sup>29</sup>

The Manitoba Film Classification Board does not cut or prohibit films. In that province, a film will be given a "Restricted Adult" classification if it contains depictions of any of the following: oral sex, fellatio, buggery, cunnilingus, penetration, bestiality, masturbation, ejaculation, actual portrayal of child pornography, graphic portrayal of genital close-ups, or extreme acts of violence with sexual activity.<sup>30</sup>

It is interesting to note how the different boards, proceeding from these varying points of view, respond to a particular film. The Louis Malle film *Pretty Baby*, starring Brooke Shields in an account of a 12 year old prostitute, was approved in British Columbia, Nova Scotia and Québec, but not in Ontario. The National Film Board of Canada film, *Not a Love Story*, a documentary on sexual exploitation in pornography that has been a strong force in mobilizing anti-pornography sentiment in Canada, was approved for showing in Québec, and exempted from review in British Columbia. In Ontario and Nova Scotia, however, it was not approved for commercial showing. In



these two provinces, it was licensed for educational purposes only.<sup>31</sup> The film *Caligula* also received diverse treatment in Canadian jurisdictions. The American version of the film was shown with cuts in Québec, and without cuts in British Columbia. The British version was approved without cuts in Alberta, Manitoba, Saskatchewan, and New Brunswick, and with cuts in Ontario. In Nova Scotia, the Board refused to approve the British version, with cuts, that had been shown in Ontario.<sup>32</sup>

## 5. Classifying Films

In addition to the jurisdiction to prohibit and to cut films, provincial authorities also exercise a power to review and classify films. Each film shown in the province must be classified, and the classification must be displayed at the theatre and in advertising related to the film. It is apparent from an examination of the classification systems of the various provinces, that the aim of such systems is to keep children and young people from seeing that which is considered unsuitable for their age and maturity. The classification approach as a whole, as well as some particular aspects of it, makes it clear that the success of classification depends on the involvement of parents or other adults responsible for children.

Some provincial regimes include in the legislation not only a list of the various classifications which apply in the province, but also a description of the scope of the various classifications. The Ontario *Theatres Act* sets out in a new subsection 3(8), enacted in 1984, the four categories used in Ontario, with the nature of each.<sup>33</sup> The "Family" classification is given to films which are appropriate for viewing by a person of any age. "Parental Guidance" is to indicate that in the Board's opinion every parent should exercise discretion in permitting a child to view the film. "Adult Accompaniment" is for films to be restricted to persons 14 years of age or older, or to persons younger than 14 who are accompanied by an adult. "Restricted" films are those restricted to persons 18 years of age or older.

The British Columbia *Motion Picture Act* sets out the classifications with a description of each: "General" (suitable for all persons), "Adult" (unsuitable for or of no interest to a person under the age of 18) and "Restricted" (suitable only for a person 18 years of age or over).<sup>34</sup> The British Columbia Film Classification Board is also experimenting with a fourth classification which is referred to as "14 years". The effect of this classification is that no one under 14 can be admitted to the movie unless accompanied by an adult.

Manitoba is the only other jurisdiction where the statute itself contains information about not only the classifications, but also the basis upon which they may be arrived at. Subsection 23(2) of the *Amusements Act* provides that the Film Classification Board shall classify any film or slide which in its opinion is unsuitable for viewing by children or by a family by reason of sex, nudity, violence, foul language or other reason, in such a manner that the film or slide shall be restricted to viewing only by persons 18 years of age or over.<sup>35</sup>

The Regulations then elaborate upon the classification scheme, which involves five headings. “General” denotes acceptable for all audiences, without consideration of age, and “Mature” means suitable only for adults or mature young people because of theme, content or treatment that might require more mature judgment by viewers. No age limit is attached to the “Mature” category, but the Regulation provides that an element of this classification is that parents would exercise discretion in deciding whether to let young people see the film. Films classified as “Adult Parental Guidance” are not to be shown to persons under the age of 18 unless accompanied by a parent, or adult guardian, because of theme, content, or treatment. “Restricted Adult” films are those which shall not be viewed by persons under 18 because of theme, content or treatment.<sup>36</sup>

The Alberta *Amusements Act* provides for the making of Regulations classifying films as “family pictures” or “pictures for universal exhibition” or for any other system of division.<sup>37</sup> The system contained in the Regulations features four categories of film. “General” and “Parental Guidance” are those suitable for all ages, “Mature” films are those which persons under 14 cannot see unless accompanied by an adult, and “Restricted Adult” films are those restricted to persons over the age of 18.<sup>38</sup>

The *Theatres and Cinematographs Act* of Saskatchewan requires that the Film Classification Board classify all films presented to it as “General”, “Adult”, “Restricted Adult” or “Special X”,<sup>39</sup> but neither the *Act* nor the Regulations give any indication of the basis on which that classifying is to be done. Classifications in Nova Scotia are “General”, “Adult” and “Restricted”. These three are set out in the Regulations,<sup>40</sup> rather than the *Act*, and there is no indication in either the *Act* or the Regulations as to how they will be applied. The same three categories of Restricted, Adult, and General appear to apply in New Brunswick,<sup>41</sup> but no specific provision is made to this effect in either the *Act* or the Regulations.

There is, overall, considerable similarity in the basic approach of the classification systems. All feature a General category, suitable for all viewers, and a Restricted category to which only those 18 or over will be admitted. Another commonly used dividing line is the age of 14; some systems contain a category of films in respect of which parental guidance or adult accompaniment is required for those under 14.

Although the outline of the classification schemes is similar from province to province, there is considerable variation in legislative treatment of the classification system. Some provinces include the basic outlines of the scheme right in the legislation, or in a combination of legislation and regulations, while others have very sketchy information about the classification system in their legislation and regulations. In all cases, we expect that the day-to-day administration of the scheme will be a lot more complicated than is revealed in the Acts and Regulations. How people get information about the criteria which the classification authorities are using thus becomes an important question, just as it is in the case of prohibition and cutting of films. Not only the would-be



exhibitor of films, but also citizens interested in particular decisions or in the process as a whole, may have a difficult time finding out what is going on.

## 6. Display of Classification Information

The legislation of most provinces requires that the classification given to a film by the board be displayed. These display requirements may encompass both a requirement to state the classification in advertisements for the film, and a requirement to show the classification at the entrance to the theatre. Some jurisdictions require only one or other of these methods. The legislation of two jurisdictions goes further in this effort to alert the public to the sort of material which they can expect to see inside the theatre.

The *Theatres and Cinematographs Regulations* of Saskatchewan require that in addition to classifying a film, the Film Classification Board shall determine whether the public should be warned of potentially offensive scenes, language or violence contained in any film.<sup>42</sup> The Board has the power to require that both the warning and the classification be included in advertising for the film and displayed at the theatre.<sup>43</sup>

Apart from legislation, there may be other methods used by provincial authorities to convey warnings, or information, to prospective audiences. The Ontario Board, for example, has a system of notations (i.e. "Foul language") which it attaches to films, and these appear in the advertising for such films. There does not appear to be any explicit legal authority for this practice.

## 7. Entrance Restrictions

The classification system is one major way in which provincial legislation attempts to keep children and young persons from material deemed inappropriate for them. The system works in conjunction with parental initiatives, providing information which the parent or other responsible adult may use to assess and influence the viewing habits of the young person.

There are, in the legislation, attempts to influence this behaviour more directly. The New Brunswick Regulation provides that a child under 10 is not permitted to attend any theatre or place of amusement except on Saturdays and statutory holiday matinees, unless accompanied by an adult. A child apparently under the age of 16 is not permitted to attend any such place after seven o'clock in the evening or during school hours, unless accompanied by an adult.<sup>44</sup> This prohibition, which does not depend on the type of film being exhibited, seems aimed at the conduct of the child in the same way as school truancy legislation may be. A somewhat similar provision in the Ontario legislation states that no film shall be exhibited in a theatre where a person under the age of 12 years, not accompanied by a person at least 16 years of age, is permitted to attend, unless there is in the theatre a uniformed attendant 18 years of age or older.<sup>45</sup>



These two provisions are the only ones along these lines which we find in provincial censorship legislation. Much more common are entrance restrictions which relate to the classification system. These may be directed toward the theatre operator, forbidding him or her to permit the entry of, say, someone under the age of 18 to a restricted performance. Or, they may be directed toward the young person directly. The *Motion Picture Act* of British Columbia provides an example of a prohibition directed to both child and adult; it provides in subsection 8(3) that unless accompanied by a parent or other responsible adult, no person under 18 shall attend or be permitted to attend a restricted film.<sup>46</sup>

In the case of these restrictions on entry, as in the classification systems themselves, the role of the parent or other responsible adult is recognized. A child or young person may sometimes be refused admission to a restricted performance altogether (as is the case in Saskatchewan),<sup>47</sup> but on the other hand, as in the British Columbia example, may be refused admission only if unaccompanied.<sup>48</sup> The same holds true with entry restrictions on even younger people. The Regulations of Nova Scotia prohibit a theatre owner from admitting to an "Adult" film any person under 14, unless the person is accompanied by someone 19 years of age or over.<sup>49</sup>

## 8. Advertising Controls

All of the provincial legislation relating to film censorship or review, except that of New Brunswick, requires that advertising for a particular movie also be approved by the board.

In a few jurisdictions, the legislation itself contains the standards which are to govern consideration of advertising material. The *Theatres and Cinematographs Act* of Saskatchewan, for example, prohibits any advertisement that:

- (a) gives details of a criminal action or depicts criminals as admirable or heroic characters;
- (b) is immoral or obscene or suggests lewdness or indecency;
- (c) offers evil suggestions to the minds of young people or children; or
- (d) is for any other reason injurious to public morals or opposed to the public welfare.<sup>50</sup>

The standards enunciated in the Manitoba and Alberta legislation appear, not in connection with the Board's prior review of advertisements, but rather in connection with powers conferred by the *Act* to seize and destroy materials that offend. The Manitoba *Amusements Act* allows the Film Classification Board to instruct a peace officer or inspector to remove from all public places any advertisement of an immoral, obscene, or indecent nature, or which depicts any murder, robbery, or criminal assault, or the killing of any person.<sup>51</sup> The Alberta *Amusements Act* permits the making of regulations permitting seizure and destruction of advertisements that are indecent or have an immoral, degrading or objectionable tendency.<sup>52</sup> No such regulations have been made.

A number of questions are raised by these provisions about control of advertising. Almost all have broad powers of prior restraint, and there are very few jurisdictions where there is any indication at all of the standards which will be applied in exercising those powers. The seizure provisions do not explicitly provide for any sort of hearing before the seizure and destruction of the material. These aspects of the advertising regulation provisions, raise in our minds the question of whether these could be said to be a reasonable limit imposed by law on the freedom of expression guaranteed by the *Charter of Rights*. Also at issue may well be the Charter's guarantee in section 8 against unlawful search and seizure.

## 9. Overview

Even this brief survey of film regulation in Canada shows what diversity of approach there exists, both with regard to the substance of the standards applied and the ensuing results, and also with regard to the degree of public accessibility of these standards. It is useful to remember that the constitutional foundation for film regulation by the provinces relies in part at least on this local diversity. Mr. Justice Ritchie of the Supreme Court of Canada stated in the *McNeil* case that in a country as vast and diverse as Canada, where tastes and standards may vary from one area to another, the determination of what is and what is not acceptable on moral grounds for public exhibition, may be viewed as a matter of a "local and private nature in a Province" and therefore within provincial competence under the *Constitution Act, 1867*.<sup>53</sup>

Although it may be desirable to recognize local diversity, however, this recognition leads to problems. The boundaries between the provinces are open: there are no Customs or other barriers between them. Modern technology permits the production of numerous videotapes from another tape or from a film. The combination of these two factors will permit circulation of a film, by means of videotapes for private viewing, in a province where it was not cleared for commercial showing.

Witnesses at our hearings expressed concern about this development. The potential impact of the phenomenon can be appreciated when one considers that provincial boards review many more films imported from other countries, than films produced in Canada.

## 10. Regulation of Videotapes

Public exhibition of videotapes is dealt with in a number of jurisdictions in the same way as public exhibition of film. In these provinces, the relevant Act or Regulation defines "film" in such a way as to include videotape, thus extending to this medium all of the provisions governing public exhibition of conventional film.<sup>54</sup>



However, in two jurisdictions, the regulatory scheme has been extended beyond public exhibition of videotapes to encompass sale and rental of tapes for private consumption. In both of these provinces, this has been accomplished by making changes to the regulations dealing with “film exchanges”.

The first jurisdiction to bring videotapes under regulation was Nova Scotia. A regulation passed in February 1984 defined “film exchange” as including retail outlets which sell, lease, lend, exchange or distribute film to the public.<sup>55</sup> Film was defined as including videocassette, videodisc and videotape. The regulation requires that a film exchange obtain a licence from the Amusements Regulation Board before it can sell, lease, lend, exchange or distribute any film. The fee for the licence is very small.

A number of rules govern the activities of a film exchange. An exchange is required to mark every videofilm with the classification which the Board has given to the film; both the actual container of the film and any used for display purposes must bear a sticker with the appropriate designation, whether “General”, “Adult” or “Restricted”. Where the film has not been classified by the Board, a sticker bearing the word “Unclassified” must be affixed. The exchange must indicate in all advertising of a film or video the classification which the Board has given, or that the film is unclassified. The appropriate designation is also required to appear on every list of videofilms that is made available to customers.

The Regulations contain a prohibition against selling, leasing, lending, exchanging or distributing to any person under 18 a film classified as “Restricted”.

One of the major problems with any scheme of video regulation is, of course, whether to require board clearance of each of the thousands of videos likely to be in circulation in a province at any given time. These Nova Scotia regulations on film exchanges appear to assume that not all the tapes will be seen by the board, because they include the “unclassified” category. This is a departure from the rules which apply to the commercial film exchanges which supply films to movie theatres. Section 18 of Regulation 130/82 under the Nova Scotia *Theatres and Amusements Act* provides that no film exchange shall sell, lease or exchange any film unless a certificate of the Board has been issued in respect of it. A film circulated without a certificate may be confiscated. One assumes that sheer practicality may have dictated the distinction.

Many tapes now in circulation are probably not reproductions of films which were shown in the province; there will thus be no certificate in respect of the work on the tape. It would be very difficult to call them all back in for certification. The same difficulty arises in respect of tapes entering the province for which no commercial showing is sought. The task of reviewing and classifying each of these would be enormous. The labelling requirements, and the requirements to show in advertising and on customer lists whether or not a tape is of a classified work, seem useful ways of dealing with the inevitable



problem of unclassified works. One wonders, however, why the Regulations seem to permit sale or lease of an unclassified video to a person under 18, when at least some of these unclassified tapes may well be on a par with those in the "Restricted" class.

The province of Ontario introduced a video regulation scheme with the 1984 amendment of the *Theatres Act*. The definition of "film exchange" in the *Act* was changed to "the business of distributing film", with "distribute" being defined to include distribute for direct or indirect gain, rent, lease and sell.<sup>56</sup> The Regulation under the *Theatres Act* was changed to introduce the concept of a "film exchange-retail". This is a film exchange that does not distribute film for the purposes of exhibition.<sup>57</sup> Before the changes to the *Act* and Regulations, this type of exchange was totally exempt from the requirements of the *Act* and Regulations. Now, however, the film exchange-retail is required to possess a licence and is subject to certain of the requirements of the *Act*. However, a film exchange-retail is not subject to subsection 35(1) of the amended *Theatres Act*, which provides that before the exhibition or distribution in Ontario of a film, an application for approval to exhibit or distribute and for classification of the film shall be made to the Board.<sup>58</sup>

The film exchange-retail amendments to the regulation having been made in early 1985, we are not in a position to comment on their operation. Obviously, observers will follow with interest the course of this experiment in video regulation, as they will comparable efforts in Nova Scotia and the United Kingdom.

## Footnotes

- <sup>1</sup> Badgley Report, Vol. II, at 1109 ff.
- <sup>2</sup> N. Boyd, *Sexuality and Violence, Imagery and Reality: Censorship and Criminal Control of Obscenity*, W.P.P.P. #16.
- <sup>3</sup> Nova Scotia: *Theatres and Amusements Act*, R.S.N.S. 1967, c.304, as amended by S.N.S. 1972, c.54. N.S. Reg. 97/78 as amended by N.S. Reg. 36/81; N.S. Reg. 96/81; N.S. Reg. 130/82; N.S. Reg. 16/83; N.S. Reg. 48/83, and Regulations Respecting Film Exchanges, February 21, 1984.
- New Brunswick: *Theatres, Cinematographs and Amusements Act*, R.S.N.B. 1973, c.T-5, as amended by S.N.B. 1977, c. M-11.1; S.N.B. 1978, c. D-11.2; S.N.B. 1979, c.41; S.N.B. 1979, c.71; S.N.B. 1980, c.32. *General Regulation - Theatres, Cinematographs and Amusements Act* (N.B. Reb. 84-249).
- Québec: *An Act Respecting the Cinema*, R.S.Q. 1977, c. C-18. *Cinema Act*, S.Q. 1983 assented to June 23, 1983, but not yet proclaimed. There is also a *Regulation Concerning The Bureau de Surveillance du Cinéma* passed under the *Cinema Act*, R.S.Q. 1964, c.55.
- Ontario: *Theatres Act*, R.S.O. 1980, c.498, as amended by S.O. 1984, c.56. Regulation 931, R.R.O. 1980, as amended by O. Reg 29/82, O. Reg. 56/85 and O. Reg. 61/85.
- Manitoba: *The Amusements Act*, R.S.M. 1970 c. A70 as amended by S.M. 1970, c.96, s.5; S.M. 1972, c.6, s.28-29; S.M. 1972, c.35; S.M. 1972, c.74; S.M. 1974, c.14; S.M. 1974, c.64, s.29; S.M. 1975, c.42, s.2; S.M. 1975, c.63; S.M. 1978, c.49, s.6; S.M. 1979, c.28, s.2. M.R. 49/75, as amended by M.R. 103/76; M.R. 65/78; M.R. 2/79; M.R. 115/80; M.R. 111/82.
- Saskatchewan: *The Theatres and Cinematographs Act*, R.S.S. 1978, c.T-11. *The Theatres and Cinematographs Regulations*, O.C. 1873/81.
- Alberta: *Amusements Act*, R.S.A. 1980, c.A-41. Alta. Reg. 72/57, as amended by Alta. Reg. 261/82; Alta. Reg. 8/83.
- British Columbia: *Motion Picture Act*, R.S.B.C. 1979, c.284, as amended by S.B.C. 1981, c.20, ss.48-9. B.C. Reg. 221/70, as amended by B.C. Reg. 92/79; B.C. Reg. 358/79; B.C. Reg 459/81.
- <sup>4</sup> See, for example, the British Columbia *Motion Picture Act*, R.S.B.C. 1979, c.284, s.1; the Alberta *Amusements Act*, R.S.A. 1980, c.A-41, s.1(c); the Saskatchewan *Theatres and Cinematographs Act*, R.S.S. 1978, c.T-11, s.2(c); Manitoba *Amusements Act*, R.S.M. 1970, c.A70, as amended, s.2(f); Ontario *Theatres Act*, R.S.O. 1980, c.498, as amended, s.1(d).
- <sup>5</sup> In Nova Scotia, the *Regulations Respecting Film Exchanges*, creating a licensing regime for video retailers, were approved by the Lieutenant Governor in Council on February 21, 1984. Amendments to the Ontario *Theatres Act*, effected by S.O. 1984, c.56, opened the way to including video retailers within the Ontario scheme, and Ontario Regulations 56/85 and 61/85 were passed pursuant to the amended legislation.
- <sup>6</sup> *The Censoring of Moving Pictures Act*, R.S. Nfld. 1970, c.30.
- <sup>7</sup> Badgley Report, Vol. II, at 1109.
- <sup>8</sup> *Ibid.*, at 1110.
- <sup>9</sup> See Nova Scotia *Theatres and Amusements Act*, R.S.N.S. 1967, c.304, s.2(1)(g); New Brunswick *Theatres, Cinematographs and Amusements Act*, R.S.N.B. 1973, c. T-5, s.32(g); Ontario *Theatres Act*, s.3(5)(a) as enacted by S.O. 1984, c.56, s.3; Alberta *Amusements Act*, R.S.A. 1980, c.A-41; B.C. *Motion Picture Act*, R.S.B.C. 1979, c.284, s.4(c).
- <sup>10</sup> *Re Nova Scotia Board of Censors et al and McNeil*, [1978] 2 S.C.R. 662, (1978) 84 D.L.R. (3d) 1.
- <sup>11</sup> By S.O. 1984, c.56, s.13.
- <sup>12</sup> Section 21(2), added to Regulation 931 of R.R.O. 1980 by O. Reg 56/85, s.2.
- <sup>13</sup> Section 21(3), added to Regulation 931 of R.R.O. 1980 by O. Reg 56/85, s.2.
- <sup>14</sup> *Re Ontario Film & Video Appreciation Society and Ontario Board of Censors* (1984) 5 D.L.R. (4th) 766 (Ont. C.A.), affirming 147 D.L.R. (3d) 58 (Ont. H.C.-Div. Ct.).
- <sup>15</sup> Manitoba *Amusements Act*, s.22(3), as enacted by S.M. 1972, c.74, s.4.

- <sup>16</sup> *An Act Respecting the Cinema*, R.S.Q. 1977, c. C-18, s.16 ff. and *Cinema Act*, S.Q. 1983, c-37, s.76 ff.
- <sup>17</sup> See s.3(5)(b) of the Ontario *Theatres Act*, as enacted by S.O. 1984, c.56, s.3; Saskatchewan *Theatres and Cinematographs Act*, R.S.S. 1978, c. T-11, s. 7(3)(b).
- <sup>18</sup> *Motion Picture Act*, R.S.B.C. 1979, c.284, c.4(b).
- <sup>19</sup> Nova Scotia *Theatres and Amusements Act*, R.S.N.S. 1967, c.304, s.17(1).
- <sup>20</sup> Alta. Reg. 72/57 as amended, s.18(1).
- <sup>21</sup> Badgley Report, Vol. II, at 1115.
- <sup>22</sup> New Brunswick *Theatres, Cinematographs and Amusements Act*, R.S.N.B. 1973, c. T-5, s.25(1).
- <sup>23</sup> Boyd, *Sexuality and Violence, Imagery and Reality: Censorship and Criminal Control of Obscenity*, W.P.P.P. #16 at 51-54.
- <sup>24</sup> Ontario, Ministry of Consumer and Commercial Relations, Theatres Branch Annual Report 1982-1983, at 15, cited in Boyd, *op. cit.* at 48.
- <sup>25</sup> Boyd, *op. cit.* at 49.
- <sup>26</sup> Amusements Regulation Board, *Classification Parameters*, quoted in Boyd, *op. cit.* at 50.
- <sup>27</sup> Boyd, *op. cit.* at 49-50.
- <sup>28</sup> *Ibid.*, at 51-52.
- <sup>29</sup> Badgley Report, Vol. II, at 1115.
- <sup>30</sup> *Amusement Act* R.S.M. 1970 as amended.
- <sup>31</sup> Boyd, *op. cit.* at 55.
- <sup>32</sup> Badgley Report, Vol. II, at 1115.
- <sup>33</sup> Subsections 3(7) and 3(8) enacted by S.O. 1984, c.56, s.3.
- <sup>34</sup> R.S.B.C. 1979, c.284, s.8(1).
- <sup>35</sup> As enacted by S.M. 1972, c.74, s.4.
- <sup>36</sup> Manitoba Regulation 49/75, ss. 2 to 6 inclusive.
- <sup>37</sup> R.S.A. 1980, c. A-41, s.23(m)(i).
- <sup>38</sup> Alta. Reg. 261/82, s.19.
- <sup>39</sup> R.S.S. 1978, c. T-11, s.7(3)(c).
- <sup>40</sup> In N.S. Reg. 129/82, s.17(2).
- <sup>41</sup> Subsection 25(7) of the *General Regulation - Theatres, Cinematographs and Amusements Act*, 84-249 uses these three categories to refer to trailers, but we could not find a provision specifically applying them to feature films.
- <sup>42</sup> Subsection 18(1) of Order in Council 1873/81.
- <sup>43</sup> Subsection 18(2) of Order in Council 1873/81.
- <sup>44</sup> R.S.N.B. 1973, c. T-5, s.14(1)
- <sup>45</sup> Subsection 20(2) of the *Theatres Act*, enacted by S.O. 1984, c.56, s.10.
- <sup>46</sup> R.S.B.C. 1979, c.284, s.8(3).
- <sup>47</sup> *Theatres and Cinematographs Act*, R.S.S. 1978, c. T-11, s.15(b).
- <sup>48</sup> *Motion Picture Act*, R.S.B.C. 1979, c.284, s.8(3).
- <sup>49</sup> N.S. Reg. 129/82, s.21(b).
- <sup>50</sup> R.S.S. 1978, c. T-11, s.13(1).
- <sup>51</sup> R.S.M. 1970, c.A70, s.24(1).
- <sup>52</sup> R.S.A. 1980, c. A-41, s.23(n).
- <sup>53</sup> (1978), 84 D.L.R. (3d) 1, at 28.
- <sup>54</sup> See note 4.
- <sup>55</sup> See note 5.
- <sup>56</sup> See s.1(ba) added to the *Theatres Act* by S.O. 1984, c.56, s.1(2) and the amendment to s.1(f) enacted by S.O. 1984, c.56, s.1(3).
- <sup>57</sup> See O. Reg. 61/85, s.1, adding a new s.1(ca) to s.1 of Regulation 931, R.R.O. 1980.
- <sup>58</sup> See the amendment to s.2(3) of Regulation 931, effected by O.Reg. 61/85, s.2.



## Chapter 15

# Control and Regulation of Pornography by Municipal Law

As has been pointed out in Part I, municipalities in Canada have authority to regulate and control a wide range of activities. They are subject to only three constraints: the *Charter of Rights and Freedoms*; the division of powers within the Canadian Constitution; and the fact that municipalities' powers are assigned to them by provincial legislatures. Municipalities have the power to license and otherwise regulate businesses, and to zone land use within their boundaries. Their powers also extend to control of the highways and other public places within their jurisdiction and to the control of nuisances.

Although municipalities have authority to make by-laws regulating and governing trades, they cannot use this power to make it unlawful to carry out legal business activities.<sup>1</sup> This position was recently confirmed in *City of Prince George v. Payne*<sup>2</sup> where the Supreme Court of Canada held that the city of Prince George could not use the power to refuse a business licence to prohibit any "sex shop" from opening there. There is a suggestion in that decision, however, that zoning by-laws could have been used to prevent the location of "sex boutiques" within the city. The city of Vancouver recently took this approach and passed a by-law preventing businesses retailing "sex orientated products" from locating within the city. That by-law has been successfully challenged on the grounds of vagueness but not on the legitimacy of the use of the zoning power to prevent the location of such establishments within Vancouver.<sup>3</sup>

Canadian municipalities have endeavoured, particularly in recent years, to use their powers to enact regulatory and zoning by-laws to control the activities of establishments engaged in what might be described as the "sex trade", in particular, "adult entertainment parlours", and the display of so-called "adult materials". Although some of these by-laws have been struck down, it seems that in every case, that has been the result of a finding that the specific

enactment is overly vague or encroaches on the federal power over criminal law. There is nothing in these cases to indicate that a carefully worded by-law, which is clearly regulatory in purpose, will be struck down. Indeed, there is every reason to suggest that it will be upheld.

The designation “adult entertainment parlour” is principally, but not exclusively, a creature of the *Municipal Act*<sup>4</sup> of Ontario in which Section 222 allows municipalities to regulate such establishments. The definition used in that section is very broad and includes premises featuring striptease shows, nude or semi-nude waitresses, sex shops and businesses offering adult materials, including books and magazines, which “appeal to, or are designed to appeal to, erotic or sexual appetites or inclinations”.<sup>5</sup>

Some Ontario municipalities regulate adult entertainment parlours through licensing regulations which deal with the type of business they can conduct, hours of business, advertising, etc., and impose heavy licence fees. Some municipalities also use zoning regulations to strictly control where such businesses can locate. For example, the city of North York allows adult entertainment parlours only in industrial areas and at least 500 metres away from residential areas.<sup>6</sup> In a recent decision of the Ontario Provincial Court,<sup>7</sup> a zoning by-law confirming the location of adult entertainment parlours in the city of Oshawa was upheld. Such by-laws are, however, subject to general provisions regarding zoning, for example, the approval of the Municipal Board in Ontario, and the need for a public hearing in British Columbia.

Regulatory by-laws governing adult entertainment parlours have been subject to several challenges. They have been challenged on the ground that, in effect, they regulate obscenity, which is a matter for the federal authorities under the criminal law. In *Sharlmark Hotels Ltd. v. Metropolitan Toronto*<sup>8</sup> the Ontario Divisional Court upheld Toronto’s by-laws dealing with adult entertainment parlours as being regulatory in nature and not trespassing on the criminal law power. More recently, the Toronto “G-String” by-law requiring dancers to have an opaque covering over their pubic area was upheld in *Koumoudouros v. Metropolitan Toronto*,<sup>9</sup> and a British Columbia court upheld a by-law which prohibited in licensed establishments “entertainment” involving the use or display of any person whose genitals can be seen.<sup>10</sup>

By contrast in *Nordee Investments Ltd. v. The City of Burlington*,<sup>11</sup> a by-law which attempted to regulate nudity in eating establishments, was struck down by the Ontario Court of Appeal.

The court held that the by-law was, in effect, an attempt to prohibit in Burlington any form of activity, including dancing, where any part of the breast or buttock is exposed. It held that the by-law went beyond regulation, was inconsistent with the *Criminal Code* and hence not within the power of the municipality to enact. The court was concerned with the wide scope of the by-law and interpreted it as being applicable even to ballet dancers performing in a theatre where beverages were available during intermission. The Court distinguished the earlier decision in the *Sharlmark Hotels* case on the basis

that there the by-law dealt *only* with adult entertainment parlours. In conclusion, the court found that a municipality cannot:

under the guise of regulating all establishments where food and drink is prepared or made available, enact a standard with regard to nudity that is in conflict with that set out in the *Criminal Code*. Such a by-law, under the pretext of regulating a wide variety of establishments, denies defences available under the *Code* and creates a form of censorship that may vary from community to community.

In summary, genuinely regulatory by-laws with well defined and specific terms are likely to be upheld. However, those like the Burlington by-law which can be read in a broad manner and viewed as an attempt to impose a stricter standard than that imposed by the *Criminal Code*, are unlikely to survive challenge. They will be struck down as, in effect, an attempt to prohibit the activities by a municipal government lacking the power to pass criminal law.

Municipalities have dealt with the matter of the display of “adult material” in various ways. Their major objective appears to be to prevent offensive material being displayed where children may be exposed to it. Several municipalities have had success in this area by asking retailers to voluntarily place such material behind opaque covers at a certain height above the ground, for example, the Ontario municipalities of Guelph and Brockville. Others have resorted to by-laws and enforcement. Municipalities in Québec have been particularly active in this regard, enacting numerous by-laws dealing with the display of erotic objects and literature. Most require magazines and books to be placed over five feet off the ground and displayed behind an opaque screen so that only the title is visible.<sup>12</sup>

Some municipalities have apparently had the problem solved for them by citizens’ initiative. In British Columbia, the municipality of Delta found that the problem was solved when parents threatened to impose economic sanctions on stores that openly displayed such materials. Other municipalities across the country have found that when customers systematically deny their custom to businesses that refuse to restrict sexually explicit material, positive results usually follow.

A less orthodox solution was alluded to by the City Clerk of Port Coquitlam in this letter to the Committee of April 26, 1984:

The one problem that did arise in Port Coquitlam concerned the distribution of what were alleged to be pornographic video tapes and this was quickly solved when an extremist group firebombed the store which shortly thereafter shut its doors.

In Ontario, the City of Hamilton attempted to control the display of adult reading materials by requiring that a seller first obtain a licence under the adult entertainment parlour licensing provisions, and then comply with height and cover regulations concerning their display. The by-law was struck down by the Court of Appeal in *Hamilton Independent Variety & Confectionary Stores v. City of Hamilton*<sup>13</sup> as being vague and, therefore, void for uncertainty. The Court held that the wording “appealing or designed to appeal to erotic or



sexual appetites or inclinations” was not adequate to allow a retailer to decide whether he needed a licence or not.

In a more recent decision of the Divisional Court in Ontario,<sup>14</sup> a similar Toronto by-law, which imposed an obligation to obtain a licence if one wished to sell material which:

- (i) portrays or depicts by means of photography or drawing or otherwise, female breasts, any person’s pubic, perineal and preanal areas and buttocks, and
- (ii) appeals to, or is designed to appeal to, erotic and sexual appetites and inclinations

was also struck down for vagueness. However, the judge felt bound to discuss the constitutionality of the provision and declared the enabling section of the *Municipal Act*<sup>15</sup> beyond the power of the province to enact, so far as it attempted to deal with the distribution of books and magazines. In reaching this decision, the judge referred to the penalties that could be imposed on a seller who failed to obtain a licence and to the fact that the by-law did not regulate all booksellers.

The court’s comments with respect to the vagueness of the by-law follow logically from the finding of the Court of Appeal in the *Hamilton* case. Doubts may be raised, however, about the judge’s comments on the issue of the power of the province to enact the by-law. It is generally accepted in other authorities that municipalities can regulate businesses by special and more demanding regimes not applicable to businesses generally. What this case seems to be saying is that within a particular category of business, a by-law cannot discriminate between different types of operators. It remains to be seen whether this refinement will receive broader judicial support.

It does appear that in other provinces, municipalities have successfully controlled the display of these items under their general power to regulate businesses, without specific enabling legislation similar to that found in the *Municipal Act* of Ontario. For example, the city of Vancouver recently enacted a by-law which requires the operation of any business, trade or occupation which sells adult publications, to display such material behind an opaque screen 47 inches above the ground.<sup>16</sup>

Despite the element of uncertainty left by the most recent decision in Ontario, municipalities do have the power to regulate the display of pornography, as long as the by-law is sufficiently precise and detailed and the effect of the regulation is not to prohibit the sale or use of the material. The latter objective can, it seems, be achieved by a properly framed zoning by-law. The only question mark relates to whether a by-law which attempts to specially regulate a minority of a larger group of outlets, is within the power of the municipalities.

Although the degree of uncertainty about the powers of municipalities in this regard is limited, the fact that any uncertainty exists has made some

municipalities very reluctant to introduce regulations. This reluctance has been accentuated by the considerable cost involved in responding to a challenge of the validity of by-laws in the courts. The Courts have proved to be expensive laboratories for the testing of municipal by-laws.

## Footnotes

- <sup>1</sup> *City of Toronto v. Virgo*, [1896] A.C. 88 (P.C., Canada).
- <sup>2</sup> *City of Prince George v. Payne* (1977), 2 D.L.R. (3rd) 1 (S.C.C.).
- <sup>3</sup> In *Red Hot Video v. City of Vancouver* (1984), 5 D.L.R. (4th) 61 (B.C.S.C.) the by-law was upheld, but has recently been struck down by the Court of Appeal on the ground of vagueness in a short interim oral judgment.
- <sup>4</sup> *Municipal Act*, R.S.O. 1970, C. 236.
- <sup>5</sup> *Ibid.*, s. 222(9).
- <sup>6</sup> City of North York, By-Law 27901.
- <sup>7</sup> *R. v. 507638 Ontario Ltd. and 505141 Ontario Ltd.* 1984 unreported (Ont.Prov.Ct.).
- <sup>8</sup> *Sharlmark Hotel Ltd. v. Metro Toronto* (1981), 121 D.L.R. (3rd) 415 (Ont.Div.Ct.).
- <sup>9</sup> *Koumoudouros v. Metro Toronto* (1984), 6 D.L.R. (4th) 523 (Ont.Div.Ct.).
- <sup>10</sup> *City of Port Alberni v. Hotel Barclay Ltd.* 3 Jan. 1984 unreported (B.C. Prov. Ct.).
- <sup>11</sup> *Nordee Investments Ltd. v. City of Burlington*, July 25, 1984 unreported (Ontario Court of Appeal).
- <sup>12</sup> See e.g. City of Hull By-law 1737; City of Lachine By-law 2333; City of Mount Royal By-law 1153; City of Pointe Claire By-law 2228.
- <sup>13</sup> *Hamilton Independent Variety & Confectionary Stores v. City of Hamilton* (1983), 137 D.L.R. (3rd) 499 (Ont.C.A.).
- <sup>14</sup> *Information Retailers Association of Metropolitan Toronto* 15 Oct, 1984 unreported (Ont.Div.Ct.).
- <sup>15</sup> *Municipal Act*, R.S.O. 1970, c.236.
- <sup>16</sup> Vancouver by-law 1984.



## Section III

# Legal and Social Reactions to Pornography in other Countries

## Summary

Research was conducted for or by the Committee into the legal approaches and social attitudes to pornography in several countries with social and cultural traditions similar to those of Canada. In the first chapter of this section, we consider the experience of the United States. We then proceed in Chapter 17 to a discussion of three Commonwealth jurisdictions, England and Wales, Australia and New Zealand. In Chapter 18 we move to consideration of the law and social reaction in five continental European countries. The review of the experiences of these countries is not exhaustive, but we think there is sufficient detail to provide some useful information or reactions to pornography elsewhere as a way of examining the possible range of options for Canada.

There are very few international Agreements and Conventions dealing with what are referred to as “obscene” writings and representations. In 1983, the Economic and Social Council of the United Nations passed a resolution which essentially recommended that member states legislate domestically to curb production and trade of pornography, and to impose severe penalties where children are involved. A description of these international initiatives and Canada’s record of adherence to them is discussed in Chapter 44 of Part IV.



## Chapter 16

# The United States

The United States, like Canada, is a federal state. However, unlike Canada, jurisdiction over criminal law in the United States rests with the state governments. Each of the 50 states is therefore free to enact its own set of criminal prohibitions to deal with pornography.

There are, however, several federal enactments dealing with such matters as sending pornographic material through the mails, importing pornography and transporting pornography across interstate boundaries. They are prohibitory in nature. Operating along side this legislation is a large body of regulatory legislation that controls pornography through means other than the threat of criminal sanction. Most of this legislation has been passed by municipalities.

Despite the fact that there is a tremendous amount of legislation in the United States aimed at it, pornography is freely available in that country. The major reason for this apparent inconsistency arises because of the interpretation that has been given to the guarantee of “freedom of speech” in the First Amendment to the American Constitution. The Supreme Court of the United States has decided that most of what can be called pornography is protected by the First Amendment. In fact, it is only the really “hard-core” pornographic material that satisfies the stringent test of obscenity set down by the court in the 1973 case of *Miller v. California*<sup>1</sup> that is denied that protection. The test asks:

- (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes sexual conduct in a particularly offensive manner; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

All three of these questions need to be answered in the affirmative for the material to lose the protection of the First Amendment.

The *Miller* decision also held that there is no need to fix the “community” whose standards are to be applied as the *national* community. States are,



therefore, free to select a more limited community if they wish. At the same time, the Supreme Court has made it clear that the “average person” who applies those standards is the average *adult* person, not the average child.<sup>2</sup>

The upshot of this landmark decision has been that much of what is commonly considered pornographic is protected from regulation by both the state and federal governments. The protection from regulation is not, however, absolute. The need to regulate must be shown to be “compelling”. On this basis, the Supreme Court has upheld both a municipal ordinance restricting the areas in which theatres showing “adult” movies could locate<sup>3</sup> and state legislation prohibiting the sale of certain books and magazines to children.<sup>4</sup> And, in a recent case, *New York v. Ferber*<sup>5</sup>, the Supreme Court upheld state legislation prohibiting the dissemination of material which showed children engaged in sexual conduct. In the Court’s view, child pornography was a distinct category of speech that, like obscene speech, was beyond the reach of the protection afforded by the First Amendment.

It is still possible, therefore, for the state and federal governments in the United States to legislate against pornographic material that does not meet the *Miller* test. By and large, however, state governments have preferred not to legislate against such material except for special provisions designed to protect children. In fact, over 40 states have expressly incorporated the *Miller* test into their criminal codes, although the language used in the legislation is not always identical. The kinds of sexual conduct referred to in the second branch of the test as well as the size of the community whose standards are to be used, can vary from state to state. Despite these differences, there is a high degree of uniformity in the legislation enacted by the various states.

The *Miller* test has also been used in many of the state and municipal enactments that take a public nuisance approach to the control of pornography. These enactments are based on the principle that activities that are injurious to the public health, safety or morals amount to a public nuisance and are subject to abatement by prohibitory injunction. Obscene materials are declared to constitute a public nuisance and provision is made for the bringing of civil actions to prevent stores from continuing to sell such materials.<sup>6</sup>

Legislation at the federal level in the United States seldom incorporates the *Miller* test. The prohibitions contained in this legislation tend to be formulated in terms of words like “obscene”, “profane”, “lewd”, “lascivious”, “filthy”, “indecent” or some combination thereof, with no definitions being given for them. Into this category fall the prohibitions against sending offensive matter through the mails,<sup>7</sup> sending or transporting such matter in interstate commerce,<sup>8</sup> using offensive language on the radio<sup>9</sup> and importing offensive matter into the country.<sup>10</sup>

Federal legislation dealing with child pornography also fails to incorporate the *Miller* test. The prohibition here is directed against “visual depictions” of “sexually explicit conduct” involving children, with no reference at all to any qualitative standard.<sup>11</sup> In fact, the only federal legislation that does incorporate

the *Miller* test of obscenity appears to be a bill not yet enacted that deals with the use of obscene language and images on radio, television and cable television.<sup>12</sup>

The absence of express reference in federal legislation to the language of the *Miller* test does not appear to have rendered that legislation unconstitutional.<sup>13</sup> Indeed, the courts appear to have been willing to read the test into the legislation. As a result, the *Miller* test does affect federal legislation. The only exception is legislation directed at child pornography, which, as we saw earlier in the discussion of the *Ferber* case, is a distinct category of unprotected speech for First Amendment purposes.

The First Amendment is not the only source of constraints on legislative power in the area of pornography. The right of privacy (which the United States Supreme Court has said can be implied from the American *Bill of Rights*) has been held to be a bar to making the mere possession of obscene material a crime.<sup>14</sup> This has not been a significant constraint on legislative power, however. The Supreme Court has decided that the right of privacy cannot be used to prevent governments from prohibiting the various ways in which people might attempt to take obscene material into their private possession. Hence, the Supreme Court has upheld as valid legislation prohibiting the carriage of obscene material in one's luggage on an airplane,<sup>15</sup> as well as legislation prohibiting the receipt of obscene materials through the mails.<sup>16</sup>

Enforcement of the laws against pornography has proven difficult in the United States. One of the major reasons has been that it is not very clear what material is caught by the variety of laws. Another problem has been the tremendous volume of material in circulation in the country. Still another has been a shortage of regulatory and enforcement personnel. As a result of these problems, enforcement efforts have been concentrated in the areas of child pornography and the involvement in the pornography industry of organized crime. Little tends to be done about adult pornography. In some cities, like New York, the police will act only if a complaint from the public is received.

One of the interesting discoveries made by the Committee's researchers is that, in spite of the enforcement problems just alluded to, the City of Cincinnati in Ohio claims to have done away with pornography. There the "battle against pornography" has been waged, it appears, not by criminal prosecutions but by civil actions. The actions are based on the kind of public nuisance statutes mentioned earlier. The successful actions have resulted in pornography outlets simply being closed down.

To our knowledge there is no governmental involvement in the United States in the censorship and classification of films for public viewing. The classification of films is performed by a body established by the film industry itself. The major reason for the lack of governmental involvement in this area is, once again, the First Amendment and the fact that the United States Supreme Court has shown little sympathy for "prior restraints" on speech.

Needless to say, existing legislation and enforcement techniques and priorities are seen as unsatisfactory by some Americans. Much opposition has been voiced by some conservatives, who, through organizations established for the purpose, are active lobbyists at both levels of government for tighter control over pornography. Feminists, too, are campaigning for a tougher approach in this area. Two of the leading feminists, Catharine MacKinnon and Andrea Dworkin, have proposed a "human rights approach" to deal with pornography. The details of this approach are discussed in a later chapter of this report, but the basic theme is that pornography is seen as a form of discrimination against women. Women are, therefore, given the right to claim damages to compensate them for the harm such discrimination causes. Thus far, however, the only city to enact this approach by city ordinance has had the legislation struck down as being in violation of the First Amendment.<sup>17</sup>



## Footnotes

- <sup>1</sup> 413 U.S. 15 (1973).
- <sup>2</sup> *Pinkus v. U.S.* 436 U.S. 293 (1978).
- <sup>3</sup> *Young v. American Mini Theatres Inc.* 427 U.S. 50 (1976).
- <sup>4</sup> *Ginzburg v. U.S.* 390 U.S. 629 (1968).
- <sup>5</sup> 458 U.S. 1113 (1982).
- <sup>6</sup> These enactments are discussed by Judge Borins in his recent decision in *R v. Nicols* ( 27 Nov. 1984, unreported (Ont. Co. Ct.)).
- <sup>7</sup> 18 U.S.C., s. 1461 and 18 U.S.C., s. 1463.
- <sup>8</sup> 18 U.S.C., s. 1462 and 18 U.S.C., s. 1465.
- <sup>9</sup> 18 U.S.C., s. 1464.
- <sup>10</sup> 19 U.S.C., s. 1305.
- <sup>11</sup> *The Child Protection Act*, 18 U.S.C., ss. 2251-2255.
- <sup>12</sup> The statute, called the *Cable-Porn and Dial-Porn Control Act*, would amend 18 U.S.C., s. 1464.
- <sup>13</sup> See, for example, *Hamling v. U.S.* 418 U.S. 87 (1974) and *U.S. v. Reidel* 402 U.S. 351 (1971).
- <sup>14</sup> *Stanley v. Georgia* 394 U.S. 557 (1969).
- <sup>15</sup> *U.S. v. Orito* 413 U.S. 139 (1973).
- <sup>16</sup> *U.S. v. Reidel*, *supra*, note 13.
- <sup>17</sup> *American Booksellers Assoc. Inc. v. Mayor of the City of Indianapolis* No.1P84-791C (Dist. Indiana Nov. 19, 1984).



## Chapter 17

# Commonwealth Countries

### 1. England and Wales

The subject of pornography is dealt with in England and Wales in a variety of different statutes. The trend in recent years has been towards greater state involvement.

The major piece of British legislation is the *Obscene Publications Act 1959*.<sup>1</sup> The *Act* was prompted in part by the fact that the common law offence of obscene libel was being used against what many Britons thought was "serious literature". The *Act* replaced the common law test of "obscenity" developed by Chief Justice Cockburn in 1868 in *R. v. Hicklin*.<sup>2</sup> It will be recalled that that test was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall". The new statutory test was whether the effect of the material in question is, "if taken as a whole, such as to tend to deprave and corrupt those who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it".<sup>3</sup>

There are two major differences between these two tests. One is that the *Hicklin* test isolated the allegedly obscene parts of a work and examined them without reference to the whole, while the statutory test requires that any part must be viewed in the context of the entire work. In addition, under the *Hicklin* test, the measuring stick was the effect the material might have on the most vulnerable people within society, regardless of whether they would actually come into possession of the material. The statutory test is specifically directed to those people who are likely to encounter the material.

The *Obscene Publications Act 1959* also added, in section 4, the defence of "public good", giving the accused an opportunity to show that the material was "in the interests of science, literature, art or learning, or of other objects of general concern". The *Act* expressly provides that expert evidence is admissible to establish the defence.

The offences created by the *Obscene Publications Act 1959* are (1) publishing, whether for gain or not, an obscene article; and (2) having an



obscene article for publication or gain. The term “publish” is defined to include all forms of distribution, including giving and lending, and offering to sell or rent. The word “article” is defined to include written and pictorial material, sound recordings, objects and films.<sup>4</sup>

An important feature of the 1959 *Act* is the forfeiture provision, section 3. That provision is virtually identical to section 160 of our *Criminal Code*. It authorizes the issuance of warrants entitling peace officers to seize material believed to be obscene. The material is then the subject of a further hearing where the Crown seeks to establish that the material is obscene. A finding that it is obscene does not result in the owner or person in possession of it being convicted. Rather, as in the case of our section 160, the material is simply forfeited to the Crown.

The provisions of section 3 were criticized in the 1979 report by the Williams Committee on Obscenity and Film Censorship for the absence of any provision giving the right to have the show cause hearing held before a jury. This omission was seen to be particularly important because experience had shown that in prosecutions under section 2 of the *Act*, in which the accused can elect to go before a jury, juries had been less willing to convict than judges.<sup>5</sup> The Williams Committee also expressed concern about the fact that section 3 allows the state to detain goods for a period of time without the goods having been found to be obscene.<sup>6</sup>

Although the test of obscenity focuses on whether the material has a tendency to deprave and corrupt those people who are likely to encounter it, experience has shown that the focus in cases arising under the *Act* has often been on whether or not the material offends general community standards of what is acceptable. The presumption appears to have been made that, if the material does offend these standards, it will have the necessary damaging effects on those who read or view it.<sup>7</sup>

It would seem, therefore, that, in much the same way as the test of obscenity in our own section 159(8) has been rewritten by our courts to introduce the element of community standards, the test in the 1959 *Act* has likewise been rewritten by the courts in England.

The “public good” defence has been a matter of considerable controversy in England. While there is much sympathy for the view that works of real literary or artistic merit should not be caught by the *Act*, difficulty has been found with the notion that a work that can deprave and corrupt some people can also be for the good of others or the public generally. Problems have also arisen in the application of the defence. Its open-ended nature has resulted in some cases in experts being called to testify as to the therapeutic value of reading or seeing pornography (although the House of Lords eventually ruled such evidence to be improper).<sup>8</sup> There have also been suggestions that the “public good” element is to be considered alongside the obscenity element in deciding whether the material in question meets or exceeds the community standards of acceptability.

The importation of pornographic material is governed by Customs legislation.<sup>9</sup> This legislation prohibits the importation of material that is “indecent or obscene”. This term has been taken to impose a higher standard than that imposed by the *Obscene Publications Act 1959*, with the result that material that cannot be imported may nevertheless be produced and distributed domestically. In this regard, it is also to be noted that the Customs legislation makes no provision for a public good defence.

This same “indecent or obscene” test is used in postal legislation to prohibit the use of the mails to distribute pornographic material.<sup>10</sup> It appears, however, that this prohibition is very seldom enforced in respect of domestic mail because of the difficulty of discovering the contents of letters and packages. Mail coming in from outside the country is, of course, subject to Customs regulations which provide that mail can be opened for examination by Customs officials.

Obscene performances of plays were brought under statutory control by the *Theatres Act 1968*.<sup>11</sup> That law prohibits, with a few exceptions, the giving of an obscene performance of a play, whether in public or private and whether for gain or not. The prohibition is limited to those who direct or otherwise control or produce the performance; performers themselves are not covered. The same test of obscenity is used here as is used in the *Obscene Publications Act 1959* and the legislation provides for a “public good” defence. It would appear that the Act is used very seldom.

Special legislation concerning children was enacted in 1978.<sup>12</sup> This legislation is designed to prevent persons taking and distributing “indecent” photographs of children under 16. On a charge of distributing such photographs, the accused is entitled to be acquitted if he can show he had a “legitimate reason” for distributing them or that he did not know, and had no cause to suspect, that they were “indecent”. The term “indecent” is nowhere defined in the *Act*. It would appear, however, that it imports a lower standard than the term “obscene” as that term is defined in the *Obscene Publications Act 1959*.

Prior to 1981, indecent public displays were governed by the *Vagrancy Acts* of 1824 and 1834.<sup>13</sup> These enactments prohibited the public display of any obscene print, picture or “other indecent exhibition”. In 1981 the British Parliament enacted the *Indecent Displays (Control) Act 1981*<sup>14</sup> which created the new offence of displaying “indecent matter ... in or so as to be visible from any public place”. The term “public place” is defined to exclude both places that charge an entrance fee for the purpose of viewing the display and shops that have an “adequate warning” about what they have on display. It is made clear that neither of the exclusions will apply if persons under 18 are permitted entry. Again the term “indecent” is left undefined. It is provided, however, that in determining whether any displayed matter is indecent, “account shall be taken of the effect of juxtaposing one thing with another.”



In 1982 an amendment to the *Local Government (Miscellaneous Provisions) Act 1982*<sup>15</sup> gave to local governments broad powers over so-called "sex establishments". One of the powers given to such governments is the power to exclude such businesses entirely from certain areas and districts. The City of Westminster, which had applied considerable pressure on the British Parliament to introduce this legislation, has used its new powers to exclude sex establishments from a large number of areas within London and to set a maximum for the number of licences it will grant in the few areas that remained. The majority of these licences were ultimately allocated to Soho.

The public showing of films is government regulated by a system of licensing *cinemas* rather than a system of censorship or classifying particular *films*.<sup>16</sup> Licences to operate cinemas are issued by local governments which impose as conditions on those licences a number of limitations on the kinds of films that can be shown. These conditions can vary from place to place, although a significant number of local governments adopt the list of "model conditions" prepared by the British Home Office.

Failure to observe these conditions, either by showing movies that are deemed unsuitable or by showing them to children when they are only suitable for adults, puts the licence at risk. The local government has the authority to determine what is and what is not suitable for viewing by the public or by a particular segment of the public. Many local governments, however, simply defer to the directions and classifications made by the British Board of Film Censors, a non-governmental body formed by members of the film trade.

The most recent legislative enactment in England and Wales is the new *Video Recordings Act 1984*<sup>17</sup> which has instituted a regime of very tight controls over the sale and rental of video recordings. The statute was prompted by concern about the easy access children had to the sexually explicit and violent videos available in video stores. The *Act* requires that, with a couple of minor exceptions, all videos be reviewed and classified or, if necessary, banned prior to distribution to the public. Heavy fines can be imposed on those who fail to have their videos reviewed, as well as on those who defy the rulings of the authority charged with the responsibility of doing the reviewing. That authority, it is interesting to note, will be the British Board of Film Censors.

Pressure for tougher laws on pornography in Britain has come in large part from conservative moralists, and in particular the redoubtable Mrs. Mary Whitehouse and her National Viewers and Listeners Association (NVALA). Their campaign has been assisted by the support of such establishment figures as Lord Longford, the author of a 1972 report on pornography. The women's movement, which the report of the Williams Committee described as basically uninterested in the issue of obscenity during the late 1970's, has begun to show its concern more recently. Undoubtedly influenced by feminist opinion in the United States, concerned British women have engaged increasingly in political campaigning against pornography. Some have even taken to direct action by defacing "sexual establishments", "sitting in" at the offices of the "gutter press" and participating in solidarity marches.



## 2. Australia

Australia is a federal state where the legislative jurisdiction with respect to pornography is divided between the central Parliament and the six state legislatures. The state legislatures have the power to enact criminal law and to regulate intrastate commerce. The majority of the legislation in the area of pornography is, therefore, to be found at the state level.

As will be seen, Australia has adopted a markedly different approach to the control of pornography than that adopted in Canada. They have opted for a legal regime based on pro-active censorship rather than on reactive punishment.

The importation of pornographic material is controlled at the federal level. *The Customs Act 1901*<sup>18</sup> empowers the Governor General to prohibit the importation of goods into Australia by regulation. Two sets of regulations have been enacted pursuant to this power, the *Customs (Prohibited Imports) Regulations*<sup>19</sup> and the *Customs (Cinematograph Films) Regulations*.<sup>20</sup> The former set of regulations is directed primarily at books and magazines while the latter is directed at films.

Until recently, the *Customs (Prohibited Imports) Regulations* prohibited material that was “indecent” or “obscene”, “unduly emphasized matters of sex” or was “likely to encourage depravity”. These terms tended to be read together and were taken to impose a “community standards of decency” test. This test was applied strictly by the courts, with the result that, in one case, Gore Vidal’s book *Myra Breckenridge* was banned.<sup>21</sup> In 1973, shortly after this case, the Department of Customs and Excise issued a memorandum to its field officers advising them that a new policy was to be adopted with respect to pornographic material. That policy was, in effect, to relax controls and to concentrate on prohibited goods other than pornography. The change in policy was said to have been based on the view that the state should interfere as little as possible in what adults in Australia read or viewed.

In 1984, following a study of the role of Customs in the state of New South Wales,<sup>22</sup> the *Customs (Prohibited Goods) Regulations* were amended to bring them more into line with the Department’s new policy. In place of terms like “indecent” and “obscene” are found references to child pornography, bestiality and violence (including sexual violence). These prohibitions are directed at pictorial depictions only and, in the case of the first two, apply only where the depictions are “likely to cause offence to a reasonable adult person”.

The importation of films is controlled by the *Customs (Cinematograph Films) Regulations*. These regulations have undergone considerable change over the years but the basic structure appears to have remained intact. That structure calls for films coming into Australia to be viewed by the Commonwealth Film Censorship Board prior to being released to the importer. That body has the power both to ban films and to classify them. As of 1983, the regulations required the Board to ban films that were “indecent or obscene”,

films that were “likely to be injurious to morality or to encourage or incite to crime” and films that “depict any matter, the exhibition of which is undesirable in the public interest”. It would appear that, as in the case of printed material, far less has been kept out of the country than the rather restrictive language of the regulations would suggest should have been. The policy in this area is said to be under review.

As might be expected, state legislation varies from state to state. There are, however, a number of common features to the regimes the states have established to deal with pornography. The most significant of these, and the most interesting from a comparative point of view, is the classification and censorship of *all* pornographic material that is designed for public distribution. Representative of the kind of scheme the states have established is that in place in New South Wales. *The Indecent Articles and Classified Publications Act, 1975*<sup>23</sup> (N.S.W.) calls for the appointment of “classification officers” and for the establishment of a Publications Classification Board. The classification officers are public servants but the members of the Publications Classification Board are appointed from the public. The *Act* stipulates that the Board must include at least one man and one woman as well as one lawyer and one expert in literature, art, medicine or science. As few as five and as many as seven persons can sit on the Board at any one time.

Review of a particular publication can be initiated either by the Minister responsible for the *Act* or by any person involved in the publication’s distribution. The publication is first examined by a classification officer. An appeal can be taken from the decision of the classification officer to the Board.

The decisions open to the classification officer and the Board are (1) to authorize the unrestricted distribution of the publication; (2) to restrict the distribution of the publication to persons 18 or over; (3) to restrict the distribution of the publication to under-the-counter sales to persons 18 or over who make an unsolicited personal request for it; and (4) to ban the distribution of the publication.

The only material which is subject to a total ban is child pornography, which is defined as material which depicts a child engaged in an activity of a sexual nature or in the presence of another person who is so engaged. The definition of “child” covers persons under 16, persons who appear to be under 16 and persons represented to be under 16.

In determining whether or not to restrict the distribution of a particular publication, the classification officers and the Board are required to consider “the manner in which and the extent to which, the publication relates to or depicts matters of sex, drug addiction, horror, crime, cruelty or violence”.

The rulings of both the classification officers and the Board are published in the official Gazette. Publication in the Gazette is considered to put everyone in the state on notice as to the manner in which a particular publication is to be distributed or, in the case of child pornography, that no distribution is permitted.



Publications subject to restricted distribution can be sold only if they are completely wrapped in opaque wrapping and if they are marked either “R” (which applies to the first restricted category) or “Direct Sale” (which applies to the second restricted category). There are further restrictions on the display and advertising of such publications.

In order to provide sanctions to the regulatory regime, provision is made for various offences. These include distributing material otherwise than in accordance with the decision of the classification officer or the Board, as the case may be, and distributing “indecent” material that has not been classified. The term “indecent”, which is not defined in the *Act*, has been interpreted to mean inconsistent with the contemporary standards of decency of the ordinary Australian.<sup>24</sup> Literary, artistic, medical or scientific value is a factor in the determination of whether something is “indecent”, and evidence can be called on this question.

Not all of the state schemes in this area operate in precisely the same way as the New South Wales scheme operates. In Queensland, for example, the tribunal established by the legislation has no power to classify; material is either banned altogether or permitted. In Western Australia, the tribunal has advisory powers only; the power to restrict or ban resides with a Minister of the Crown. In South Australia, the tribunal is required to “have due regard to the views of the Minister”. In spite of these and other differences, however, it is apparent that the practice of government controlled censorship of pornographic material has taken firm hold in Australia.

Another interesting feature of the control of pornography in Australia is the extent to which governments there have attempted to co-operate with each other. Some state censoring bodies are expressly encouraged in the legislation creating them to rely on the decisions of other state or national censoring bodies. In the area of film censorship this co-operation has extended to the point of state governments delegating their power to the Commonwealth Film Censorship Board.

In recent years, much effort has been expended in an attempt to establish a uniform scheme for the censorship and classification of both films and videos. Agreement on the scheme, which would have resulted in very little being banned, appeared to have been reached in early 1984. Eventually, Queensland, probably the most conservative of the states, opted to go its own way.

One of the products of the co-operation between governments in this area has been the enactment in the Australian Capital Territory of the *Classification of Publications Ordinance 1984*.<sup>25</sup> This legislation was intended to be the model for the state governments, particularly insofar as the control of videos was concerned. It applies to locally produced as well as imported material that is sold, rented or displayed in the Australian Capital Territory. It provides for compulsory review of such material with appropriate classification markings for consumer guidance. The emphasis is on protecting children and persons who are liable to be offended by material that has been thrust upon them.



Under the scheme, which bears a close resemblance to that in place in New South Wales, printed matter is subject to one of four classifications, including “unrestricted” and “banned”.

Films and videos are subject to one of five classifications, one of which is “X” for “hard-core” content.

Child pornography and material that incites to terrorism is banned. Other material that is to be banned deals with matters of sex, drugs, crime, cruelty, violence or revolting or abhorrent phenomena in a manner that offends against the standards of morality, decency and propriety generally accepted by reasonable adult persons.

Whether or not this “model legislation” will be adopted by the state legislatures remains to be seen. The Queensland government has already indicated that it will not adopt it, and has moved to introduce a more restrictive scheme to deal with videos. It is apparent that in Australia as in most countries, consensus on what to do about pornography is difficult to achieve.

### 3. New Zealand

Pornography in New Zealand is controlled by the operation of four statutes, the *Indecent Publications Act 1963*,<sup>26</sup> the *Customs Act 1966*,<sup>27</sup> the *Films Act 1983*<sup>28</sup> and the *Crimes Act 1961*.<sup>29</sup>

The most important of these appears to be the *Indecent Publications Act 1963*, which governs the production and distribution within New Zealand of “indecent” printed material and sound recordings.

At the time it was introduced, the *Indecent Publications Act 1963* represented a significant break with the past in the control of pornography in New Zealand. The statute it replaced, the *Indecent Publications Act 1910*,<sup>30</sup> had been prohibitory in thrust, with jurisdiction over the offences it created residing in the ordinary courts. The 1963 *Act* rejected that approach in favour of a more regulatory approach, with jurisdiction being transferred to an administrative tribunal.

The functions of that tribunal, which is called the Indecent Publications Tribunal, are defined in section 10 of the *Act* as follows:

- (a) to determine the character of any book or sound recording submitted to it for classification;
- (b) to classify books and sound recordings submitted to it as indecent, or not indecent in the hands or persons below a specified age, or indecent unless circulation is restricted;
- (c) to hear and determine any question relating to the character of a book or sound recording referred to it by a court in any civil or criminal proceedings, and to report its finding to the Court.

The jurisdiction of the Indecent Publications Tribunal can be invoked as of right by government officials such as the Comptroller of Customs and the Secretary of Justice, and by any other persons with leave. Interestingly, the courts are required to refer to the Tribunal any question of “indecent” that might arise before them under other legislation in a criminal or civil proceeding.

The term “indecent” is defined in the interpretation section of the *Act* to mean “dealing with sex, horror, crime, cruelty or violence in a manner which is injurious to the public good”. Section 11 lists six different factors that the Tribunal is to take into account in deciding whether or not a particular book or sound recording is indecent. These factors are:

- (a) the dominant effect of the book or sound recording as a whole;
- (b) the literary or artistic merit, or the medical, legal, political, social or scientific character or importance of the book or recording;
- (c) the class and age of persons to, or amongst whom, the publication will be distributed;
- (d) the price at which the book or sound recording is sold;
- (e) whether any person is likely to be corrupted by reading the book or hearing the sound recording and whether any other person could benefit from such activities;
- (f) whether the item displays an honest purpose, or whether its content is merely camouflage designed to render acceptable indecent parts of the material.

Over the years the Tribunal has generated a considerable body of case law, thereby providing guidance as to the standards the Tribunal has applied and will apply.

Those standards appear, when compared with those applied in North American courts, to be quite conservative. The Tribunal has repeatedly distinguished between “serious literary works” and “the mass of cheap cynically commercialized periodical and paperback pornography”. Many of the magazines that are considered standard fare in a North American newsstand have been ruled “indecent”. The *Act* recognizes, however, that standards can change over time. As a result, material that has been ruled “indecent” can be referred back to the Tribunal for reconsideration after three years have elapsed. There is, therefore, an element of what has been called “community standards” in the decision-making process.

The *Act* contains two offence-creating provisions. Section 21 lists several offences, including such acts as selling, possessing for the purposes of sale, producing and exhibiting for gain an “indecent” book or sound recording, where it is no defence that the accused had no knowledge or reasonable cause to believe that the matter was of an indecent nature. Section 22 lists a number of offences where the Crown must prove that the accused had knowledge or reasonable cause to believe that the matter in question was indecent. It is then for the defence to prove that the act of the accused “had no immoral or mischievous tendency”. The acts caught by this section include those covered by section 21 and public displays of indecent matter. Jurisdiction over all these offences remains with the ordinary courts.



The Indecent Publications Tribunal appears to have become an accepted component of the government's attempt to control pornography in New Zealand. It has been said that the appointment of the Rt. Hon. Sir Kenneth Gresson, a distinguished lawyer and former First President of the New Zealand Court of Appeal, as the first chairman, was instrumental in giving the Tribunal a degree of instant legitimacy.

The Tribunal has, however, received criticism from some quarters. A "moral majority" group, the Society for the Promotion of Community Standards, has virulently attacked many of the Tribunal's more liberal classifications. Some observers have suggested that many decisions betray the Tribunal's "bourgeois", liberal origins.<sup>31</sup> Works of literary merit by authors of critical standing have been kept free from governmental interference, while sexual materials "without artistic merit" have been ruled indecent. Some suggest that this has created a different standard of indecency for the non-professional, non-academic, semi-literate classes, presumably on the assumption that their rational powers are weaker and that a consequently greater tendency to corrupt them is present. Geoffrey Robertson, in his book *Obscenity*,<sup>32</sup> attacked the absence of the right to appeal to a jury and the political nature of appointments to the Tribunal. There has been some criticism to the same effect from within New Zealand.

Importation of pornography is controlled by section 48(1) of the *Customs Act 1966*,<sup>33</sup> which refers to "all documents within the meaning of the *Indecent Publications Act 1963* that are indecent within the meaning of that *Act*, and all other indecent or obscene articles". The question of whether a particular document is "indecent within the meaning of that *Act*" is ultimately for the Indecent Publications Tribunal to decide. Its jurisdiction in this regard can be invoked either by the Comptroller of Customs or on a reference from the courts following notice of objection to a seizure from the importer. Persons convicted under section 48(1) are liable to a fine of up to three times the market value of the goods to which the offence relates.

The *Films Act 1983*<sup>34</sup> governs film censorship in New Zealand. All films, save scientific and sports films, that are intended for public exhibition must be presented for examination to the Chief Censor's office. Section 15 of the *Act* empowers the Chief Censor to approve a film for general exhibition to the public or for restricted exhibition to certain classes of persons or on specified occasions. The Chief Censor can order the "cutting" of films and authorize the re-examination of a previously uncut unapproved film.

Films are to be refused a certificate of approval if they are "likely to be injurious to the public good". Section 13 of the *Act* outlines the factors to be considered by the censor to determine whether a film contravenes this standard. These factors resemble very closely those set out in section 11 of the *Indecent Publications Act, 1963*.

There are two features of this statute which deserve special mention. One is the power it grants to the Minister of Internal Affairs to withdraw a film



from public exhibition after approval by the Chief Censor if the film is creating widespread concern or is apparently injurious to the general public or any class of the general public. The other is its establishment of a Film Trade Board to act as a watch dog over the film industry. Members of the Board are appointed from various consumer and industry interests. The primary role of this body is to establish and maintain high standards in the industry and in service to the public.

Control of pornographic material not caught by either the *Indecent Publications Act 1963* or the *Films Act 1983* is achieved through the *Crimes Act 1961*.<sup>35</sup> Section 124 of that *Act* creates three distinct offences, one relating to indecent models or objects and two relating to indecent shows or performances. The former cannot be sold or otherwise distributed to the public while the latter cannot be either presented to the public or presented for gain. It is a defence under section 124 to show that the public good was served.

The term "indecent" is not defined in the *Crimes Act 1961*. Until fairly recently, the *Hicklin* test appeared to be the preferred approach to applying this term. But, in 1973, the New Zealand Court of Appeal opted for what it called a "plain meaning approach".<sup>36</sup> The court did not define precisely what test this approach entails. However, the decision suggests that the court was of the view that the test should be comparatively restrictive.

## Footnotes

- <sup>1</sup> 7 & 8 Eliz. 2, c. 66, (1959).
- <sup>2</sup> (1868), L.R. 3 Q.B. 360.
- <sup>3</sup> *Obscene Publications Act*, 7 & 8 Eliz. 2, c.66 (1959) s.1(1).
- <sup>4</sup> *Ibid.*, s. 1(2).
- <sup>5</sup> Williams Report
- <sup>6</sup> *Ibid.*, at 14-15.
- <sup>7</sup> *Ibid.*, at 11.
- <sup>8</sup> *D.P.P. v. Jordan*, [1976] 3 All E.R. 775 (H.L.).
- <sup>9</sup> *Customs Consolidation Act*, 39-40 Vict., c. 35, (1876).
- <sup>10</sup> *Post Office Act*, 1 & 2 Eliz. 2, c.36 (1953).
- <sup>11</sup> 1968, c.54.
- <sup>12</sup> *Protection of Children Act*, 1978, c. 37.
- <sup>13</sup> 3 G. 4, c. 40 and 5 G. 4., c. 83.
- <sup>14</sup> 1981, c. 42.
- <sup>15</sup> 1982, c. 30.
- <sup>16</sup> See the discussion of this in the Williams Report, at 22-34.
- <sup>17</sup> 1984 (U.K.)
- <sup>18</sup> 1901, No. 6. (Aust.).
- <sup>19</sup> 1956, No. 90 (Aust. S.R.).
- <sup>20</sup> 1956, No. 94 (Aust. S.R.).
- <sup>21</sup> *Altman v. Forbes* (1970), 91 W.N. (N.S.W.) 84 (Dist. Ct.).
- <sup>22</sup> F.J. Mahony, *Review of Customs Administration and Procedure in New South Wales* (1983).
- <sup>23</sup> 1975, No. 32 (N.S.W.) See also the *Objectionable Literature Act* 1954, No. 2 (Qsld); the *Classification of Publications Act* 1974, No. 23 (S. Aust.); the *Police Offences (Offensive Publications) Act* 1973, No. 8443 (Vict); and the *Indecent Publications Amendment Act* 1974, No. 39, (W. Aust).
- <sup>24</sup> *Crowe v. Graham* (1968), 41 A.L.J.R. 402 (N.S.W. C.A.).
- <sup>25</sup> 1984, (A.C.T. Ord.).
- <sup>26</sup> 1963, No. 22, (N.Z.).
- <sup>27</sup> 1966, No. 19, (N.Z.).
- <sup>28</sup> 1983, No. 130, (N.Z.).
- <sup>29</sup> 1961, No. 43, (N.Z.).
- <sup>30</sup> 1910, No. 19, (N.Z.).
- <sup>31</sup> See, for example, S. Levine, "The Indecent Publications Tribunal - Some Political Observations" (1974) 3 *Otago Law Rev.* 228.
- <sup>32</sup> (London: Weidenfelt and Nicholson, 1979.)
- <sup>33</sup> 1966, No. 19, (N.Z.).
- <sup>34</sup> 1983, No. 130, (N.Z.).
- <sup>35</sup> 1961, No. 43, (N.Z.).
- <sup>36</sup> *R. v. Dunn*, [1973] 2 N.Z.L.R. 481 (N.Z.C.A.).

## Chapter 18

# Continental European Countries

### 1. Introduction

The research on pornography in western Europe concentrated on the experience of five countries: France, West Germany, Denmark, The Netherlands and Sweden. Considerable formal variation exists amongst the various methods of control used in the five countries. These range from fairly extensive criminal law and censorship provisions in France, to an almost of total absence of legal restraint in Denmark. But, even while some of the countries of Continental Europe appear to have a restrictive legal regime, enforcement is often lax. Therefore, in order to capture an accurate impression of the current view of pornography in the countries of continental Europe, it is necessary to examine not only the law but how it is enforced.<sup>1</sup>

### 2. France

In France, with a highly centralized system of government, control of pornography is achieved through an interlocking system of criminal law and regulatory regimes. On its face, the French legislation appears to be quite restrictive. In practice, however, it appears that the state is prepared to leave considerable room to individual choice.

The major criminal provision in the area of pornography is section 283 of the *Penal Code*. This provision had its origin in the original *Penal Code* of 1810, and embodies the test "outrageous to public morals". It covers not only a broad range of acts (including manufacturing or possessing for sale, distribution, lease, display or exposition, importing or exporting, exposing to public view, selling and distributing) but also a broad range of material (including films, printed matter, sound recordings and photographs).

The term "outrageous to public morals" has been held to be wider in scope than "obscene". In fact, the Supreme Court has held that, in principle, anything which excites sexual feelings *can* be considered to be "outrageous to public morals". However, the Supreme Court has made it clear that not everything that excites sexual feelings will be so considered.



The test currently applied is whether the material contravenes “generally accepted standards of decency in such a way as to provoke the indignation and condemnation of the public”. In determining what these standards are, courts are to take into account “all manifestations of the public’s opinion, and particularly the opinions expressed by groups of concerned citizens”.

Some sense of what French courts consider the reach of the section to be is provided by two decisions involving adult “sex shops”. In each it was held that no offence had been committed. In the first (decided in 1972) the Besançon Court of Appeal took into account such factors as the denial of access to minors, the lack of public display of merchandise and a statement by the government that such establishments were not in breach of the section. A similar approach was taken by the Court of Appeal of Reims in 1977. The court noted that “the existence of such businesses is now accepted by the public at large”.

Two special procedural rules in relation to section 283 prosecutions should be noted. The first is that, before he can commence a prosecution in respect of a book that prints the names of both the author and the publisher, the prosecutor must consult with a special committee made up of representatives from the Association of Writers and the National Union of Associations for Family Affairs. That committee’s opinions are not, however, binding. The second special rule permits the Association of Writers to seek review of a book 20 years after a finding has been made that it contravenes section 283. It appears that some of Baudelaire’s works have profited from this rule.

Section 280 of the *Penal Code* prohibits all acts in public that “outrage the norms of decency”. The meaning of this term remains somewhat unclear. There is some support in court decisions for the view that this section proscribes live performances in which sexual parts are exposed or obscene gestures are made. At the same time, there seems to be a high degree of tolerance on the part of prosecutorial authorities for at least some such performances.

Only two other general *Code* provisions deserve mention. One proscribes both public oral presentations that outrage good morals and the public advertisement of licentious activities. The other prohibits the public display of indecent pictures and posters.

In addition to the general provisions of the *Penal Code*, France has special legislation relating to children and pornography. First enacted in 1949, the legislation provides for the establishment of a Special Committee for the Surveillance and Control of Publications Designed to Protect the Young. As its name implies, the Committee is charged with the responsibility of reviewing material designed for children. It has the power to prohibit certain publications on the ground that they “present debauchery in a favourable light”. It can also make recommendations to the Minister of the Interior, who is empowered to ban publications of any kind that are “dangerous for the young on account of their licentious or pornographic character or the place given to crime or violence”.

Films in France are controlled by a combination of section 283 of the *Penal Code*, film classification legislation and a special set of fiscal provisions. The film classification legislation gives the Minister of Information authority over the public showing of films. In the exercise of his censorship and classification powers, he is assisted by a Special Commission for the Control of Films. This body, which has advisory powers only, is made up of representatives from several different ministries, the film industry and other interested groups. In 1975, the Council of State, the highest administrative court in the country, directed the Minister to ensure that, in the exercise of his powers, he gave due weight to freedom of expression. It is generally felt that this direction has resulted in a relaxation of the exercise by the Minister of his broad censorship powers.

An interesting feature of this film classification system is the power given to local mayors to ban particular films. This power is limited, however, and can only be used when opposition to a film is particularly vocal.

Special fiscal legislation dealing with the film industry was introduced in 1975. The legislation is aimed at both pornographic films and films which can be said to incite violence. It calls for a heavy tax on the importation of such films and a higher value added tax on the sale within France of such films and on the admission charge levied by cinemas showing them. There is also a special tax on profits made from such films.

Pornographic films caught by the 1975 legislation have been held by the Supreme Court not to be proscribed by section 283. The 1975 legislation was said to have given immunity to such films insofar as the *Penal Code* is concerned. It appears, however, that this does not mean that *all* films are immune from prosecution under section 283. Films containing particularly detailed depictions of acts of violence and sexual perversions have been held still to fall within the purview of that provision.

Considerable public pressure developed in France calling for the regulation of video recordings. Representations were made to the government that videos had become particular vehicles for pornography. In 1983, the French Parliament made the 1975 film legislation applicable to pornographic videos but did not provide for a system of regulating the material. As a result, videos have been left outside the scope of the regulatory scheme established to deal with publicly shown films.

One additional feature of the French law on pornography that deserves note is section 289 of the *Penal Code*. That provision authorizes organizations of private citizens to participate as parties in prosecutions brought under sections 283 and 284 provided they are first approved by the government. It appears, however, that few groups have made use of this provision.

### 3. West Germany

In West Germany legislative power is shared between the federal parliament (the Bundesrat) and 10 state governments. Power over criminal law is given to both levels of government, with federal legislation prevailing in the case of conflict. Our analysis focuses on the federal legislation.

The current penal law in the area of pornography was enacted in 1973. A product of compromise between libertarians and moral conservatives, the law is based on a distinction between "soft" and "hard-core" pornography. The offences in relation to the former are found in section 184(1) and (2), and include:

- (a) offering it to a person under 18;
- (b) displaying it in public;
- (c) mailing it to persons who have not solicited it;
- (d) exporting it;
- (e) presenting it in films in public places where a charge of admission is levied;
- (f) presenting it on television and radio.

Offences in relation to "hard-core" pornography, which includes material portraying explicit violence, the sexual abuse of children and bestiality, are limited to the production and distribution of such material. These offences are found in section 184(3).

West German courts have had considerable difficulty interpreting the language of these provisions, particularly the terms used to define "soft-core" and "hard-core" material. The current test of "soft-core" pornography turns on whether or not the material in question gives prominence to sexual acts in a particularly offensive way and with all other aspects of human relations being ignored. If the material does so, then the court goes on to decide whether or not it is aimed exclusively or predominantly at a "lustful interest in sexuality". In applying this test, the courts have made it clear that the portrayal or description of sex organs and sexual acts, including intercourse, will not in and of itself contravene the law.

Insofar as "hard-core" pornography is concerned, the courts have tended not to give broad scope to the offences contained in the *Penal Code*. Some depictions of sexual acts by a child and of children in obscene postures have even been held to fall outside the scope of section 184(3).

The offences created by section 184 are supplemented by a special provision of the *Penal Code* that proscribes the production, display and distribution of violent pornography. This term is defined to include "materials



which depict acts of violence being committed against humans in a cruel or otherwise inhumane way and thereby glorify or treat as harmless such acts....” It appears that the courts have been reluctant to convict persons under this provision, however, and the section is seen as having little effect.

As in the case of France, West Germany has enacted special legislation to deal with pornography concerning children. *The Law on the Protection of the Young in Public Places* includes a prohibition against the public presentation of films that are likely to be detrimental to the physical, moral and social fitness of the young. That law also authorizes state authorities to classify films as appropriate for certain age groups (under 6, under 12, under 16 and under 18).

Legislation enacted in 1965 takes the protection of children one step further by empowering a body called the Board of Censorship to put written publications and other materials considered harmful to the young on a special list and thereby prohibit their distribution to persons under 18. The test applied involves determining whether the material in question endangers the moral development of the young. Of particular concern are publications that are “indecent” or incite to acts of violence, crime or racism.

*The Law on Commercial Activities* stipulates that “sex clubs” offering live sex and “peep” shows are required to obtain a licence from the appropriate municipal authorities. Moreover, the law provides that such licences are not to be issued if the performance given will contravene positive law or morality. In a recent decision, the Federal Court of Administrative Law held that no licences should be issued to clubs offering peep shows. Such shows were said to be an affront to human dignity, in part because of the dehumanizing role played in them by women.

Pornography appears not to be an issue currently causing public debate in West Germany. Women’s groups are said to be divided on the position women should be taking on the matter. Some groups call for much tighter control over pornography, particularly the violent pornography featured in some videos. Other groups are concerned that tighter controls will further the interests of moral conservatives and lead to the enactment of legislation that is not in the long term interests of women.

The German government has recently indicated a willingness to tighten up the law in two areas: the protection of children from harmful material and violent pornography. With respect to the former, it is proposed that videos be brought within the regulatory structure already in place for publicly shown films under the *Law on the Protection of the Young in Public Places*. With respect to the latter, it is proposed that the requirement that the publication in question glorify or treat as harmless the violence portrayed or described, be dropped.

## 4. Denmark

In Denmark legislative power is reposed in the national Parliament. Since 1967 Denmark has been engaged in a process of decriminalizing pornography. Supporters of this process think that the decriminalization of pornography has not only had no harmful effects on Danish society, but has indeed had significant beneficial effects. Other groups dispute this thesis and have expressed dissatisfaction with the evolving state of the law.

Prior to 1967, the basic *Penal Code* provision on pornography, section 234, made it an offence (a) to provide persons under 18 with obscene writings, pictures or objects; (b) to publish or distribute, or import for purposes of distribution, obscene writings, pictures or objects; (c) to arrange or give public addresses, performances or exhibitions of an obscene character; and (d) for gain, to publish or distribute, or import for purposes of distribution, writings or pictures which, although not obscene, had as their purpose commercial speculation in sensuality. Experience showed that convictions were seldom obtained under this section 234. When, in 1965, a Danish translation of *Fanny Hill* was found by the country's Supreme Court not to be "obscene", the Minister of Justice directed a body called The Permanent Penal Law Committee to investigate the area of obscenity and to make recommendations for reform of the law.

The main recommendation made by the Permanent Penal Law Committee was to delete reference to the word "writings" in section 234. This recommendation was accepted by the Danish Parliament and, by a vote of 159 to 13, section 234 was amended accordingly.

Two years later, in 1969, the Danish Parliament took the further step of decriminalizing the publication, distribution, and importation for the purposes of distribution of obscene pictures and objects as well as the arranging and giving of addresses, performances and exhibitions of an obscene character. The other general offence, relating to commercial speculation in sensuality, was also repealed. According to one observer, these additional steps were taken because the predicted beneficial effects of the 1967 amendment, in particular, the diminution of interest in written pornography, had in fact been realized.

In the result, section 234 of the *Penal Code* was limited in scope to protecting children from pornographic material. Even within this sphere, the trend has been in favour of decriminalization. The new section 234 made it an offence to "sell indecent pictures or objects to a person under 16 years of age". Not only had the age limit been reduced (from 18 to 16), the provision was limited to pictures and objects (leaving out writings) and to the *sale* of indecent pictures and objects (leaving out lending, renting, showing, etc.). The term "indecent", which replaced the term "obscene", appears not to be much more restrictive than its predecessor. In order to be "indecent", a picture or object must contain detailed and strongly offensive depictions of sexual topics which cannot be justified by artistic merit or scientific or educational purpose.



The *Penal Code* contains other provisions relating to children and pornography. Section 235, which was introduced in 1980, makes it an offence for anyone, for a commercial purpose, to sell or otherwise distribute, or with intent to do so, produce or procure, "indecent photographs or the like" of children. This is a provision designed to protect children from exploitation by the pornography industry. While such exploitation is itself proscribed in other *Code* sections, police have found it difficult to enforce these sections. The rationale of section 235 is reflected in the fact that it is limited in scope to commercial traffic in photographs. The judgment has presumably been made that there is little if any exploitation of children in the production of non-photographic material. The legislators have also apparently decided that the non-commercial traffic in photographic material is not an appropriate subject for legislation.

The final provision of the *Penal Code* to be mentioned is section 232, which proscribes the violation, "through gross indecency", of "the public sense of decency". This provision is understood to cover such acts as sending, showing or reading pornographic material to unconsenting adults or to children.

The object of protecting the unwilling viewer of pornography is furthered by provisions of the Standard Police Regulations. These regulations, which were enacted at the same time the major revisions were being made to the *Penal Code*, proscribe the public display and distribution of writings and pictures of an offensive character and the distribution of such writings and pictures to the homes of those who have not solicited them. The mailing of obscene material to persons who have not solicited it, is made an offence by Denmark's postal laws.

Legislative reform in the area of film censorship has paralleled that in the area of penal law. Prior to 1969, Denmark's Board of Film Censors had powers similar to those currently exercised by provincial film classification boards in Canada. In that year, new legislation was enacted which eliminated all control over the kinds of films available to adult viewers. Films that were to be shown to children were still subject to control, however, with some films being off limits to children under 16 and others being off limits to children under 12.

A further relaxation of state control over this area occurred in 1972. Previously, licences to operate public cinemas were difficult to get and could be withdrawn if high standards of service to the public were not maintained. In 1972, the legislation was amended to make it easier both to obtain and to keep such licences.

There appears to be no legislation governing the medium of television in Denmark. Films and other shows that are unsuitable for children tend to be shown late at night with appropriate warnings about their content. Videotapes intended for private use are also free from state censorship. A committee set up to examine the question, recommended in 1983 that the state not step in to control videotapes. Instead, it recommended that a tribunal issue lists of videos



that children should be encouraged to view, with the lists being posted in libraries and other places to which the public has ready access.

Experience thus far would suggest that those involved in the pornography industry in Denmark are abiding by the rules and regulations. For example, no one has yet been prosecuted under the new (1980) provision of the *Penal Code* relating to the commercial distribution of child pornography. It is said that child pornography disappeared from circulation as soon as it became clear that the new provision would be enacted. Similarly, the public display of pornographic material is said to have dropped off dramatically since the Police Regulations of 1969 were enforced with vigour in the early 1970's.

Polls conducted in Denmark in the late 1960's suggest that a majority of citizens supported the decriminalization of pornography that the Danish government embarked upon. Today, opposition to the lack of control over pornography is coming from feminist organizations and individuals, but the opposition appears to be less vigorous than that currently found in Canada. Calls for dramatic changes in the law appear to be few and far between. Emphasis is placed instead on balancing the degrading images contained in mainstream pornography with images of warmth and eroticism between equals.

## 5. The Netherlands

In The Netherlands pornography does not appear to be a major concern. What legislative reform there has been in the area in recent years has loosened rather than tightened the reins of state control. The decisions of the courts appear to be consistent with the political trend.

The major penal provision relating to pornography is section 240 of the *Penal Code*. That section, which had its origin in the *Code* of 1911, proscribes the distribution, display or exportation of any written or pictorial material or object that "offends the norms of decency". It also contains a more restrictive provision governing the distribution and display of pornographic material to persons under 18. This latter provision is complemented by section 451 which prohibits the distribution or display of material which is likely to arouse the sexual feelings of a person under 18. Finally, section 239 prohibits all acts performed in public or before a non-consenting audience that "outrage the norms of decency".

Legislation on film censorship was liberalized in 1977. The new law makes no provision for the censorship of films that are shown on television or in adult cinemas. The showing of films to persons under 16 is prohibited unless approval is first received from the National Board of Film Censorship. Approval is given unless the Board is satisfied that young people could be harmed by viewing the film in question.

Local control over pornography is virtually non-existent. This is apparently attributable to the protection accorded freedom of expression in the

Dutch Constitution. Such local control as does exist, is limited to regulations relating to the public display of objects such as sex aids.

On their face, terms like “offensive to norms of decency” and “outrage against norms of decency” would appear to be very restrictive. The judicial interpretation given by the courts is, however, quite permissive. In 1978, in what is considered to be the leading recent decision on the matter, the High Court held that the showing of *Deep Throat* in a cinema that contained warnings about the film’s content did not offend section 240. The reasoning in this decision has left many observers with the impression that all that remains to be caught by the law is the public display of pornography and the distribution of pornography to minors.

In 1979 a bill was introduced in Parliament on the basis of recommendations made to the Minister of Justice by a special advisory committee in 1972. Those recommendations, which are said to have had considerable effect on the courts’ approach to pornography, entailed limiting the role of the *Penal Code* to proscribing (a) the distribution and display of pictures and objects that “offend the norms of decency” to persons who had not consented to their distribution or display; (b) the distribution to children under 16 of pictures or objects “whose presentation to a minor can be considered harmful”; and (c) the performance of indecent acts in public or in places accessible to minors.

This bill has not yet been passed, however, primarily due to strenuous opposition to it from feminist groups. The opposition has been led by the Council for the Emancipation of Women, an official government body, and by an organization called Women Against Pornography.

Public opinion polls would appear to support a limited role for the state in the regulation of pornography, in keeping with the provisions of the 1979 bill. In a 1981 study conducted by The Netherlands Foundation for Statistical Research, it was discovered that the availability of pornography was rated the least pressing of twenty different social problems. Only three percent of those surveyed considered pornography to be a topic of interest for the population at large.

## 6. Sweden

Sweden has a reputation as a country that has taken a permissive approach to pornography. During the 1970’s that reputation was well deserved, since there was then minimal state involvement. Recent developments suggest, however, that that reputation may no longer be deserved.

The general *Penal Code* provisions relating to pornography came into force in 1970. Section 11 of Chapter 16 makes it an offence for anyone in a public place to “exhibit pornographic pictures by means of displays or other similar procedure in a manner which is likely to offend the public”. A similar



prohibition exists against sending through the mail or otherwise furnishing pornographic pictures to a person without that person's consent.

It will be noted that these proscriptions are limited to pornographic pictures. Written material is, therefore, not caught by them. However, pictures are understood to include sculptures and films.

The definition of "pornographic" currently in use includes the portrayal of explicit sexual conduct in a provocative manner where such portrayal lacks scientific or artistic value. The test is said to be purely objective in nature, with the "author's" intentions being irrelevant.

The protection of children from pornography is also dealt with in Chapter 16 of the *Penal Code*. Section 12 of that chapter makes it an offence for anyone to distribute to a child or young person a writing, picture or film, the content of which puts at risk his or her moral development. It is also made an offence to distribute pornographic material in a "concentrated" manner to children or young persons. An interesting feature of these offences is the absence in them of any age limit. It is said that the government preferred not to fix any limit because of the differing levels of maturity of young persons. It is contemplated that certain groups of young persons, for example, young men serving in the military, will not be protected by these provisions.

New legislation designed to protect children was introduced into the *Penal Code* in 1979. The new section 10(a) of Chapter 16 makes it an offence for anyone either to portray a child in a pornographic picture with the intent of distributing it or to distribute such a picture of a child. The term "pornographic" here is understood to have a somewhat broader meaning than it has in Section 11 of Chapter 16 and may catch pictures of children in a particular position or making particular gestures. Again, no age limit is prescribed.

Two recent enactments concern live performances and the dissemination of films and videos that feature excessive violence. Pornographic live performances in a place to which the public has ready access are now proscribed. So, too, is the commercial distribution of films and videos that contain explicit or prolonged portrayals of persons being subjected to brutal and sadistic violence. This latter prohibition is buttressed by a special provision dealing with the commercial distribution to children under 15 of films and videos featuring detailed and realistic portrayals of violence, or threats of violence, against adults and animals.

Apart from these criminal prohibitions on films, Sweden has special legislation to control the viewing of films in public cinemas. The National Bureau of Cinemas is empowered to ban films on several grounds, one of which is that the film "can have a brutalizing or otherwise detrimental effect or incite to crime". It is apparent that this would not catch films that are merely sexually explicit. It is understood that the Bureau will only interfere in cases of films that contain sadistic pornography or portrayals of extreme violence and even then only where the scenes in question are unnecessary for the film's development or otherwise without artistic justification.



With respect to films for children (here defined to mean those 14 and under), the Bureau is empowered to limit viewing to children under 7, children between 7 and 11 and children between 12 and 14. The test to be applied is whether the film would have a negative psychological effect on children within these age groups.

Recent statistics indicate that very few convictions are obtained under the *Penal Code* provisions in this area. For example, in respect of section 11 of Chapter 16, the statistics show five convictions in 1971, seven in 1972, five in 1973, none in 1974, one in 1975, and one in 1976. In the view of some observers, this low conviction rate is attributable to potential offenders heeding the warnings of law enforcement officers.

A recent report of a special committee of the Swedish Parliament is less sanguine and is of the view that offences under this provision were common, but, for one reason or another, were not being prosecuted.

In the same report, the special committee (known, significantly, as the Committee for the Freedom of Speech) came to the conclusion that no new legislation was required in the area of pornography. While concerned about the possible harmful effects of pornography, especially on children and the way they view human relations, the committee expressed the opinion that the criminal law was not an effective tool with which to deal with these effects. Rather, efforts to change people's attitudes by positive means had to be undertaken. One recommendation the committee did make was to eliminate the censorship of films intended for adults. Whether this recommendation will be accepted, and the recent trend towards greater state involvement thereby reversed, remains to be seen.

## Footnotes

- <sup>1</sup> The discussion of the approach to pornography in each of these five countries is based on a study commissioned by the Department of Justice. It is entitled *Pornography and Prostitution in Denmark, France, West Germany, The Netherlands and Sweden* and was prepared by J.S. Kiedrowski and J.M. van Dijk. The study does not contain many footnotes. For that reason the discussion in this Chapter has not been footnoted.

## Chapter 19

### Conclusions

The overall impression from this survey is that there is a great diversity of approaches to pornography in the countries surveyed. In the first place the pendulum has swung in the direction of liberality much further in some countries, (The Netherlands, Denmark and Sweden), than in others, (England and Wales, Australia, New Zealand, France and West Germany). Secondly, constitutional considerations have made a difference. The United States, which in other areas of the control of morality, for example prostitution, has enacted quite draconian legal provisions, has been much more circumspect about obscenity and pornography. This caution stems directly from the entrenchment of freedom of expression in the First Amendment to the Constitution. The Netherlands seem to have been affected by similar constitutional concerns about the abridgement of freedom of expression.

Geographic and demographic realities may also have made a difference. Both Australia and New Zealand, which are geographically remote and to which access is more easily controlled than in the case of the other countries, have found it feasible to develop pro-active censorship regimes to vet not only film material, but also magazines and books. While some of the other jurisdictions have systems of film censorship and classification, and several have implemented or are contemplating pro-active control of videos, there has been no attempt to develop the comprehensive, preventative legal regimes of the antipodes.

Does the survey reveal any obvious trends? In the first place, although there is, as noted above, a significant gap in liberalization of the law between The Netherlands, Denmark, Sweden and the United States on the one hand, and England and Wales, Australia, New Zealand, France and West Germany on the other, it is apparent that in all the jurisdictions, with the possible exception of New Zealand, there has been definite movement towards a less restrictive approach to sexually explicit material. This has been achieved by legislative and regulatory amendments, as in Australia and West Germany, or through prosecutorial discretion or judicial interpretation, as in England and Wales and France. To some extent at least, a distinction has developed between pornographic material which is violent, abusive and degrading on the one hand, and that which is merely sexually explicit on the other, with the former attracting the legal sanctions, or at least stiffer legal sanctions than the latter.



A second discernible trend, except in The Netherlands and Denmark, is the growing concern of legislators about child pornography. Even countries like Sweden, which took significant steps in the 1960's and 1970's to remove criminal law proscriptions on the production, distribution and sale of pornography, and the United States in which adult pornography is only sporadically attacked, have enacted special legislation or provisions for the protection of children from pornography. The more conservative jurisdictions, especially England and Wales, France and West Germany, either have introduced new provisions on children or propose to do so.

A third and complementary trend to the second is the emergence of a concern about videos. The growth of video technology and of the market for VCRs has produced something of a communications revolution by opening up access to a whole new range of visual material for use in the home. The perceived danger is that children will have virtually uncontrolled access to pornographic and violent images. As a result, a number of the countries surveyed have introduced special legislation which seeks to regulate the distribution, sale and rental of videos, typically utilizing the models of film censorship or classification. Steps along these lines have been taken or are contemplated in England and Wales, several Australian jurisdictions, France, West Germany and Sweden.

In conclusion, the overall picture seems to be one of systems struggling to balance, within the law, a recognition that social attitudes towards sex and sexuality have changed in the direction of greater tolerance of visual representations of a wide range of sexual activity on the one hand, and on the other, that relaxed attitudes have encouraged some in the pornography industry to glorify and profit from the portrayal of violence and degradation, especially of women, and the sexual exploitation of children. The process of reform is being complicated by technological breakthroughs, such as the home video explosion. Insofar as the focus in proscribing or regulating pornography has been to specify that it is the particularly odious forms of pornography which should attract legal sanctions or restraint, it can be said that the trend in the law has been towards defining the ambit of obscenity and pornography with greater precision and particularity than in the past. Again this change is one which is evident in both legislative formulations and the greater care which judges show in characterizing what it is that they find objectionable.

## Section IV

### Recommendations on Pornography





## Chapter 20

# The Criminal Code

### 1. Introduction

In making recommendations about changes in the *Criminal Code* we have drawn together all of the components of the work we have undertaken on pornography. Thus our recommendations flow from the guiding principles which we set forth in Part I, and are reflective of the current situation with respect to the availability and use of pornographic material, the harms which we feel are associated with this material and our views on the proper role of the criminal law in the area.

As we pointed out in Part I, Chapter 2 of the report, the traditional liberal view of the power of the state to limit the freedom of an individual is that the state can only act when the exercise of that person's freedom results in direct, demonstrable harm to others. By contrast the conservative view is that it is legitimate for the state to intervene to prohibit conduct in order to protect and affirm traditional moral values, even if there is no proven harm caused by the conduct to others. Mainline feminist opinion takes the middle ground that the state is justified in curbing the freedom of an individual where his conduct, while not necessarily causative of direct, demonstrable harm to others and regardless of whether or not it offends traditional moral values, does or threatens social harm in the sense that it undermines or subverts important social values and policies. In particular feminists see the equality of the sexes in political, economic, and social matters as so fundamental to the life and fabric of this country that action by the state both to promote and protect it are entirely warranted.

In our recommendations on changes to the *Criminal Code* relating to adult pornography we have applied a definition of harm which embraces not only direct, demonstrable harm to an individual, but also an element of social harm. In essence we see two forms of harm flowing from pornography. The first is the offence which it does to members of the public who are involuntarily subjected to it. The second is the broader social harm which it causes by undermining the right to equality which is set out in section 15 of the *Charter of Rights and Freedoms*.

The first of the two harms we argue should be handled by *Criminal Code* provisions which penalize failure to take steps to protect members of the public from involuntary encounter with pornographic material. The objective here is to encourage control and regulation rather than to proscribe. The second, we feel, requires direct proscription of certain forms of pornographic representations. Conscious of the concern that when the law moves beyond the prohibition of conduct which causes direct, demonstrable harm, there is a danger of excessive intrusion by the state into the lives of individuals, we have focussed on the most extreme forms of pornography. These in our minds clearly subvert the equality rights in the *Charter* and more generally the right of all individuals to be treated with respect and dignity. Moreover, they can be stated with sufficient precision to provide direction to those who have to gauge their actions according to the dictates of the law, and to the law enforcers so that undesirable interferences with freedom of expression are minimized.

We appreciate that our proscriptions will not satisfy everyone. Those of conservative mind will consider us too libertarian in our view that the bulk of pornography should be regulated rather than banned. Some feminists too may feel that we have circumscribed the pornography which is to be prohibited too narrowly. Liberals for their part may find our movement outside the traditional boundaries of harm untenable. It is our belief that, given the complexities of this area, and the conflict of philosophies to which it gives rise, our approach represents a rational, fair and realistic balancing of the interests involved, and a significant advance over the present state of the law.

## 2. Terminology

We were often told during the public hearings that a useful starting point for the reform of the law relating to pornography would be to remove the term obscenity from the *Criminal Code*. Along with obscenity would go the heading of the part of the *Code* in which it appears: "Offences Tending to Corrupt Morals".

Those who pressed for the removal of the term "obscenity" did so primarily because of their perception that sexual immorality was not really the essence of the offence in the pornographic material available today. Rather, in one way or another, the material is demeaning and degrading to women, to members of minority groups who may be portrayed in a distorted way, and ultimately to men, who are often depicted as soulless aggressors.

For some advocates of the change in terminology, the issue is not as ideologically significant. They are motivated by various reasons, ranging from a desire to signal a new approach, to a dislike of existing obscenity jurisprudence.

We agree with the suggestion that the term "obscenity" has outlived its usefulness. As we have discussed at some length in chapter 4, entitled "What is Pornography?", the fact that the dictionary definition of "obscenity"

transcends the legal definition in the *Criminal Code*, and that the imprecise terms of section 159(8) have produced more confusion than light mean that the word has little to offer as a term of legal art. Moreover, we think that the heading, with its emphasis on the corruption of morals reflects an outdated concern, one which deflects attention from the real nature of the problem which the criminal law should be addressing, the denial of human dignity.

**Recommendation 1**

**The term “obscenity” should no longer be used in the Criminal Code, and the heading “Offences Tending to Corrupt Morals” should also be removed.**

We have already stated that we do not plan to make the term “pornography” central to the definitions in our proposed amendments. It is simply too elusive to provide the precision needed in the criminal law. However, we do not consider it worthwhile to eschew the term altogether. It does convey an idea about the material we are seeking to control and an entirely new term is not only difficult to find but may not be as accurate. Accordingly, we use the term pornography in our proposed sections, although we have been sparing in that use. The most obvious use is that in the various headings we have given to proposed sections. We see as quite acceptable the use of the term pornography in this way, because any elasticity in the title is limited by the specific terms of the section or subsection. Moreover, in the title, it serves as a useful indicator of the shift in approach from a traditional moral concern with obscenity, to our more functional social concern with pornography.

The term “pornography” appears rarely in the draft sections. In a few sections, we use the term “visual pornographic material”, which is defined in quite particular terms to minimize discretion or subjective considerations. This definition is the only place in the draft provisions which actually features the term “pornography”.

**Recommendation 2**

**New criminal offences relating to “pornography” should be created, with care being exercised to ensure that the definition of the prohibited conduct, material or thing is very precise.**

### 3. Violent and Degrading Material

In discussing the meaning of the word obscenity, in Chapter 4, Section II, we made the point that there is some material which would be considered obscene, but which would not be considered pornographic. Violent material which has no sexual connotations, and disgusting material, are the two large categories of material which might well not be caught by a “pornography” approach. We note with some interest, of course, that although common understanding might include the explicitly or extremely violent within the term obscene, because it causes revulsion, the present criminal law does not prohibit material featuring only violence.



The mandate of the Committee was to study the effect and make recommendations with respect to the material that has some sexual content. At the present time the *Criminal Code* considers potentially “obscene” material in which sex and one of a number of other items is present, namely, crime, horror, cruelty or violence. As we have reviewed the material which is available and listened to people across the country, the issue of whether violence in and of itself can be so offensive or harmful that some restrictions on it are needed arose quite frequently.

Virtually everyone who raised the issue thought that violence on its own can indeed be obscene. In fact, some people who raised the issue believed that violence in the media was more of a problem than explicit sexual portrayals. The term “obscene” used in the *Criminal Code*, could, in our opinion, easily include more than just sexual material, although as we have indicated it does not currently do so. We did consider whether the retention of the term obscene would be preferable because it could allow for offensive non-sexual material to be caught. We decided, however, that we would not recommend such a course of action because it would be building yet more meaning into a term which is already highly problematic. Our focus has been on pornographic material and we propose significant changes to the way in which the *Code* deals with such material. We have not examined in any detail the problems associated with violent material that has no sexual content. Nevertheless, having given some attention to the matter, we are of the opinion that the government should give consideration to establishing a section in the *Code* which would deal with violent material in a manner similar to the one we are proposing for sexual material. We realize that a sanction against violence is potentially far-reaching and intrusive and careful study is necessary before changes to the law can be recommended.

### **Recommendation 3**

**The federal government should give immediate consideration to studying carefully the introduction of criminal sanctions against the production or sale or distribution of material containing representations of violence without sex.**

There is at least one offence in the present *Code* which does relate to disgust: subsection 159(2)(b) prohibits the public exhibition of a “disgusting object”. In our view, little that is necessary for the protection of basic values would be lost by removing altogether the penalties against material that is disgusting, provided that the criminal law regime we are recommending is in place. We have reached this conclusion because we have tried to address in our proposed sections the real harms which we think were aimed at by the prohibition against such material, like the public display of sex aids. In particular we have replaced the prohibition on the public exhibition of disgusting objects, with a section aimed at preventing access (by way of sale or display) by children to devices intended for use as sex aids. This is found in the part of the report relating to children.

#### Recommendation 4

**There should be no sanctions introduced respecting material that is 'disgusting' even though our proposed repeal of section 159 would remove the existing offence relating to a disgusting object.**

## 4. What to Control?

It was apparent at the public hearings that many people thought that the portrayals of women and children in the media generally were distorted and false depictions. We were frequently reminded that women are often seen in limited and mindless roles in television programs, as overwhelmingly concerned (to the exclusion of other interests) with marriage in popular paperback series, and as people whose sexuality can be used to sell virtually any commodity. On this view, pornography is one variant of a pervasive and dominant theme that runs through all the media, albeit a more extreme variant than some others. The argument has been raised, however, that pornography may be less harmful than the everyday, run-of-the-mill depictions in the media which we so often take for granted. This view stems from the belief that, as widespread as pornography is, the mainstream media touch the lives of virtually every single Canadian whether man, woman or child. Therefore, to seek to control what is probably a small percentage of the false depictions and leave out of the picture the vast majority of them is inconsistent and most certainly not going to achieve the result which we are ultimately seeking, that is, a reduction or elimination of such depictions.

While the Committee has every sympathy for this view, we do not believe that the elimination of false depictions of women can be achieved through *Criminal Code* provisions. What is required is re-orientation of the values and priorities of the media. This is not something that can be addressed through criminal law. Given the sheer volume of material which would be involved, criminal sanctions would not be effective and more likely to bring the law into disrepute than to solve the problem.

Moreover, broad based support is lacking at this time for the view that the content of the media is in need of the sort of re-orientation we have heard suggested. Certainly, many women's organizations see this as an important issue, one to which they are continually and effectively drawing people's attention. Similarly, religious and ethnic associations have been concerned about how they are portrayed in the media. But the efforts of these groups, especially women's groups, are quite recent in origin and have not, we think, been accepted into our everyday assumptions about the media and its content. That we are moving in the direction of accepting them is seen by the adoption of new content guidelines by the CRTC and amendments to the *Broadcasting Act*. However, these changes have not been accomplished simply for the asking, but have involved long and intensive lobbying and negotiations between interested groups, governments and the media.



We are, therefore, in need of extensive educational and informational programs to address the concern that some have about general media content and its portrayal of people. The use of the criminal law is neither an appropriate nor a practicable means for counteracting such a pervasive problem. That is not to say that legal strategies are inappropriate. Given the existence of regulations governing the media, it is certainly legitimate in our view to use the regulatory process to address these issues. Indeed, the Committee makes a series of recommendations relating to the control exercised by the CRTC over programming which are designed to combat sexist messages in the broadcast media.

The question then becomes whether or not there is any material which is so extreme or harmful in its depictions that it is qualitatively different from the general content and for that reason deserves to be treated differently. In essence, is there any material which should be subject to criminal sanction if it is produced, sold or displayed, for example? Canada, along with other western countries has so far answered "yes" to this question.

As we have already noted, we are convinced that some material of a sexual nature can be so damaging to individuals and society that it must be the subject of the criminal sanction. The crux of the issue, of course, is to define the precise nature of the material which should be prohibited or regulated in such a way as to include only the specific sorts of things which are harmful. Our ability to do this depends on our understanding of what it is about the material which causes the damage.

It is, in our view, a significant social fact that many people are offended by some kinds of material. They would not choose to view it, if given a choice, and they are offended or upset when they cannot avoid seeing it. These feelings of offence and disgust can, in our estimation, justify restraints on the display of pornography, although we do not think that these sentiments would justify criminalization of, say, producing the material. The feelings of embarrassment of individuals, no matter how many, are not a proper basis for a substantial curb on freedom of speech.

How far should the boundaries of control be extended beyond restraints on display of offensive material? As our analysis of pornography in Canada today, in Chapter 6 of Section I demonstrates, we do not have consistent and conclusive research data to tell us about all the effects of pornography and in particular whether direct, demonstrable harm is caused, and we cannot be drawn too far into surmise or speculation. Our approach is characterized by acceptance of the egalitarian argument that impairment of a fundamental social value can properly be regarded as a "harm" meriting legislative control.

Proceeding from this point of departure, we have developed a three-tier analysis of pornographic material. The first tier is material which we would subject to a criminal sanction, with no defences based on artistic merit, educational or scientific purpose. The penalties for the offence are strong. In this tier we place the following: a visual representation of a person under 18



years of age participating in explicit sexual conduct and material which advocates, encourages, condones or presents as normal the sexual abuse of children; and visual pornographic material which was produced in such a way that actual physical harm is caused to the participant or participants.

The case with respect to these forms of pornography has been made very fully in the part of the Report dealing with children and we do not intend to repeat it here.

With respect to the remaining category, there are, in our view, two reasons for prohibiting visual material in the production of which actual physical harm was caused to the person or persons depicted. The first and obvious one is to protect those who participate in the production of visual pornographic material from physical harm. It is likely, of course, that in the case of material produced outside Canada the acts that would result in such harm being caused would themselves be caught by the criminal law of the country in which they were committed. With domestically produced material, other provisions in the *Criminal Code*, for example those relating to assault, might be applicable, especially if no consent to the physical harm was evident. Be that as it may, it seemed to us, as it seemed to the Williams Committee, to be appropriate to provide this additional deterrent to the causing of such harm. We know that the relations between the producers of violent pornography and the actors in it are often such that there is little or no respect for the rights and physical welfare of the latter. Clearly, if the commercial dealings in material of this kind could be stopped, the reason for producing it would disappear.

The second reason for prohibiting this material lies in the message that most, if not all, of it conveys. That message is that it is acceptable to cause physical harm in the context of sexual relations. Whether or not it can be demonstrated empirically that this message is absorbed by the viewer, and acted upon, we believe that it is appropriate to use the criminal law to prohibit its dissemination. The social harm which is caused by the undermining of human dignity and the challenge to the equality of women is as stark here as it is with mere representations of physical harm. We elaborate on this facet of harm in our discussion of tier two material below.

We do not anticipate that this provision will often be activated. We doubt that the causation of actual physical harm is a widespread problem in the production of pornography. Moreover, there are obvious problems of proving that harm was actually caused. However, it will be available for dealing with the occasional outrageous case.

Far more pervasive is the material in which physical harm or abuse is represented in simulated depictions. This material which we consider offends equality rights and the more general right to respect for human dignity is dealt with in the second tier and is labelled "Sexually Violent and Degrading Pornography". Unlike the material in tier one, that in the second tier is subject

to the defences of genuine educational or scientific purpose, and artistic merit. The rationale for allowing defences is set out below in our discussion of the new formulation of section 159 of the *Criminal Code*.

We consider it important to comment at some length on why we have included this second tier, and the character of the harm which we feel justifies the intrusion of the criminal law at this point. As we stated in the introduction to this chapter we have concluded that the legitimate ambit of the criminal law extends beyond the causation of demonstrable, tangible harm to an individual or individuals. While recognizing the concern which liberals have that to extend the reach of the criminal law further is to open the door to abuse and possibly tyranny, we believe that there are values and policies which are so important to the welfare of Canada that they are worth protecting in their own right, even by criminal sanctions. This position which we have adopted seems to us to accord with the view taken by both the Law Reform Commission of Canada and the Department of Justice in their studies on the purposes of the criminal law.<sup>1</sup> As we have noted in our discussion of the role of criminal law in Part I, Chapter 2, the two studies see the criminal law as having both the prevention and penalizing of harm to the individual and the protection of social values as legitimate objectives.

More importantly, we believe that the *Charter of Rights and Freedoms* expressly recognizes that certain social values and policies, in particular equality “before and under the law” and “equal protection and equal benefit of the law” are entitled to both constitutional affirmation and protection, and take their place alongside the traditionally protected freedoms such as freedom of conscience, religion, thought, belief, opinion and expression. In our minds there are two possible legal consequences which flow from this recognition accorded to equality rights. In the first place it may be argued that the effect of section 15 of the *Charter* is to limit the ambit of freedom of expression in section 2(b) to exclude forms of expression which offend equality rights. The alternative position one can take is that the combined effect of section 15 and section 1 which contemplates reasonable limitations on the rights and freedoms set out in the *Charter* is to validate reasonable legal constraints, including those of the criminal law, on the exercise of rights and freedoms by individuals or groups which adversely effect or threaten the rights in section 15.

While observations on the effect of the *Charter* are in many respects still speculative, we note that the position which we have taken does have judicial support in the careful judgement of Mr. Justice Quigley of the Alberta Court of Queen’s Bench in *R. v. Keegstra*,<sup>2</sup> a decision to which we have already referred to in Part II, Chapter 8, where we discuss the general impact of the *Charter* in relation to the issue of pornography. Mr. Justice Quigley in addressing the issue of whether section 281.2(2) of the *Criminal Code* (wilfully promoting hatred against any group by communicating statements) was an infringement of “freedom of expression” under section 2(b) of the *Charter* made the following remarks:



Section 15 of the *Charter* guarantees a right which rationally flows from our affirmation that men remain free only when freedom is founded upon respect for moral and spiritual values. We have recognized that Canadians have a moral sense, that is a sense of what is good and what is evil. Section 15 also manifests in the concrete as opposed to the abstract, our affirmation that each human person has dignity and worth...<sup>3</sup>

In my view, the wilful promotion of hatred under the circumstances which fall within section 281.2(2) of the *Criminal Code* of Canada clearly contradicts the principles which recognize the dignity and worth of the members of identifiable groups, singly and collectively; it contradicts the recognition of moral and spiritual values which impels us to assert and protect the dignity of each member of our society; and it negates or limits the rights and freedoms of such target groups, and in particular denies them the right to the equal protection and benefit of the law without discrimination.<sup>4</sup>

The judge concluded that section 2(b) of the *Charter* did not contemplate “an absolute freedom permitting an unbridled right of speech or expression”. Furthermore, if he was wrong in this view, he found that section 1 provided a basis for balancing that freedom against the furtherance and protection of desirable social policies and values with which it conflicted in certain contexts. After carefully assessing the rationality and proportionality of the *Criminal Code* provision, and comparing it with the laws and customs of other free and democratic societies, he concluded that the “promoting hatred” provision in the *Code* constituted a reasonable limitation on freedom of expression.

We agree with the views and sentiments expressed in Mr. Justice Quigley’s judgement, and we believe that they have application in the present context. In the same way that freedom of expression may not extend to statements wilfully promoting hatred, or be outbalanced by the need to protect the equality rights of others, so the same conclusions can be reached in the case of certain forms of pornographic representations. We believe this to be so in particular in those cases in which the pornographic representation depicts a particular group, typically women, as less than human, and their mistreatment as a legitimate subject of sexual stimulation, typically male. We observe that section 15 of the *Charter*, insofar as it addresses the equality rights of women, represents the culmination of a long and agonizing process whereby Canadian society has come to accept and to commit itself to the policies and values associated with equal treatment of the sexes in the political, economic and social spheres. This has been reflected in both legislative and policy strategies to improve the position of women in employment, education, within the social welfare system and within the family unit. Indeed, it is a set of policies and values to which the present government has given its unqualified support in recent policy announcements relating to equal opportunity in employment. In our opinion the most hateful forms of pornography are subversive of policies and values favouring equality. While it may be difficult to characterize the representations as amounting to the promotion of hatred, they do contain a clear message that half of the Canadian population are entitled to nothing better than violent, sexual abuse, all in the cause of the supposed sexual and psychic welfare of the other half. They do so in a context, that of sexual relations, in which a combination of a desire to dominate and emotion can pose



significant dangers to the female partner. As we pointed out in Part I, Chapter 2, we recognize the importance of sexuality to a person's status as an adult, and the need to respect that facet of the physical and psychic welfare of each individual. However, we also believe that there are necessary limits to how that sexuality is manifested. In our view the limits of tolerance are reached when domination and violence infect the relationship. While it is not proven that representations and depictions of sexual violence pose the same threat to the welfare of women as the conduct itself, we are of the view that they lower the status of women and thus contravene their right to equality. In fact they strike at the very root of the policies and values of Canadian society, which, as Mr. Justice Quigley observed, are premised on the dignity and worth of all its members.

We recognize that sexually violent and degrading pornography is not limited in its focus to the abuse of women. There is some material produced in which similar conduct is depicted in a homosexual context. It may be difficult to bring these representations within the ambit of section 15 of the *Charter*. However, we are of the view that while that may be true, the material nevertheless offends the value of respect for human dignity of which Mr. Justice Quigley spoke in *Keegstra* and which is obviously broader in its scope than section 15. Accordingly, we think that a proscription against it of the type we suggest can be justified as a reasonable limitation on freedom of expression and thus saved by section 1 of the *Charter*.

Having taken this stand we are of course aware of the limitations of the criminal law in promoting and protecting values, especially where there is no or only speculative harm being caused. Moreover, we know that the criminal law can be a blunt and inappropriate instrument for working social change. We are, however, confident that with careful attention being paid to the material which we see as destructive of the social consensus which we refer to above, and the clear articulation of the conduct which we think should be proscribed, a valid statement of criminal law can be made, which not only sets out with clarity the limits of what is acceptable and unacceptable in Canadian society in terms of pornography, but also which can be enforced effectively without creating unwarranted curbs on freedom of expression.

Although it is mainly violent and sexually abusive material which we have focused on in framing our second tier recommendations for amendment of the *Criminal Code*, we have also thought it appropriate to apply the criminal law to representations which, while they do not offend the equality provisions of the *Charter* do depict conduct, such as incest, bestiality or necrophilia, which is considered socially repellent and personally degrading. We find it difficult to see how representations of such conduct would be protected by freedom of expression. Even if that freedom was extended that far, we believe that the concern to uphold social values, which is evident both in deepseated revulsion to this type of behaviours, and in its criminality, justify reasonable limitation of the freedom in terms of section 1 of the *Charter*.

Having stated the Committee's views in respect to sexually violent material, we do acknowledge that our rationale for including some material, within the purview of the *Criminal Code* will not be universally acceptable. Some people will still argue that we need a stronger and more direct relationship between the use of pornography and identifiable harms to particular individuals. In addition, there will be a more general concern about how the legislation might read. It is obviously important that the legislation not inadvertently encompass material that lacks the harmful effects of the material at which the legislation is aimed.

It was this latter problem that led the Committee to recommend that sexually violent and degrading material be prohibited and to state as clearly as possible what we mean by those terms. We have consciously rejected the use of broad terminology which would leave the characterization of the material to a test, such as the present test of community standards of tolerance.

The community standards test has been soundly criticized by everyone who has been affected by decisions made under it. Most of the criticism is directed at the impossibility of knowing what the Canadian (i.e. national) community standard is. It has been pointed out by judges, and demonstrated by other judgements, that the standard is subject to regional variation. Moreover, the standard changes over time so that publishers, for example, can only guess at what the standard is in any given year. Furthermore, while a changing standard has some value to it in that it ensures that the law does not become completely out of tune with current realities, it does give rise to what some people at the public hearings referred to as "creeping gradualism." (In the minds of some it was not so much creeping as galloping.) That is, the most extreme material which is allowed becomes the standard against which everything else is measured. The technique of publishers, therefore, who do not want any restraints on what they can produce is to constantly push the boundary of what is considered to be outside the law.

A further criticism of this test is that it lacks a principled foundation. Simply because a majority of Canadians are said to tolerate or not tolerate something tells us nothing about their reasons for doing so and hence gives us no opportunity to decide whether they are indeed valid. It is our view that decisions in respect to criminal charges should be made on the basis of clearly articulated principles and not on the basis of majoritarian impulses.

Much of the material which people brought to the attention of the Committee was presented as material which degrades women. While we have argued that some pornographic material is harmful to our fundamental values, and in this sense we have concurred with those who see it as denying women equal status with men, we have nevertheless not used the term "degrading" in our proposed amendments to the *Criminal Code*. The term appears as a heading to the material which we believe is the most subversive of social values. In this sense it is an appropriate heading for the section since it highlights what we consider to be the problem with the material. We have not, however, used the term in our specific recommendations because we consider it to be too



imprecise and too broad in its connotations. As we have argued, much of what appears as mainstream pornography could be characterized as degrading to women. We do not want to run the risk of our definitions being cast so broadly that they are struck down by the courts on the ground of vagueness or because they catch too much. Furthermore, the use of the term “degrading” would result in a more subjective element being introduced into the assessment of the material. The variable scope ascribed to the term “degrading” during the public hearings, and the occasional but worrying challenges made to literary works which treat sexual relationships openly and sensitively illustrate the difficulties which exist with interpreting such a term. We have tried as far as possible in framing our recommendations to minimize the opportunities for subjective judgements. Our approach here, as elsewhere, has been to state what depictions or descriptions are unacceptable as precisely and clearly as we can.

The third tier of materials is one which we do not consider merits criminal sanction, except in very narrow circumstances. This third tier consists of “visual pornographic material”, defined as material in which is depicted vaginal, oral or anal intercourse, masturbation, touching of the breasts or genital parts of the body, or the lewd exhibition of the genitals. Although the language of the definition is broad enough to include both explicit material involving children and sexually violent pornography, we wish to make it clear that in our view, neither of these kinds of materials falls within tier three. These two forms of materials fall into tier one and tier two respectively.

In drafting this provision, we have been mindful of the difficulties of trying to devise a comprehensive list of activities, the depiction of which is to be controlled. These difficulties led the Williams Committee to recommend, instead of a list, a test of offensiveness, which turned on the sensibilities of the “reasonable person”. We have concluded that such a flexible test would be more problematic in its operations than the use of a list. The latter is likely to provide clearer guidance on the type of material which is caught. While our list may require further refinement, we are inclined to believe that it is adequate to the task of characterizing tier three material.

It will be noted that we have employed the term “lewd” to describe certain of the representations in the definition. We do this because we wish to make it clear that it is not all representations of the breasts or genitals which should be caught by this definition. It is obviously important to distinguish a poster centre fold of *Playboy* which should be caught as tier three material, and a poster of Michaelangelos’ *David* which should not. The use of the adjective “lewd” is designed to allow the law to discriminate between what is patently offensive when displayed in public and what is not.

We think that the only problem which merits the application of the criminal law in connection with tier three material, is that of display. Accordingly, we have proposed criminal penalties for displaying the material without a warning in premises to which the public has access, as well as the restrictions on sale to and access by children which is included in the children’s part of this report. We believe that the provisions provide the necessary



safeguards against involuntary offence and the exploitation of children without curtailing freedom of expression.

Although we have devised this three-tier approach primarily to guide our thinking on the criminal law, we believe that it also serves to rationalize, as well, the relation between the federal and the provincial spheres. In our view, the proper approach is for the provinces to concentrate their regulatory efforts on the tier three material. We would hope to see a regime in which, apart from the recommended display offences, tier three material is entirely regulated by the province. The main question with respect to this material is availability, so that its potential to create offence to adults or do harm to children will be contained. Provincial film regulation schemes and municipal display by-laws seem particularly well suited to this role.

We have agreed in Chapter 14 on film classification and censorship that film and video material which does not fall within the proscription we have recommended in the *Criminal Code*, should be subject to classification rather than censorship. Accordingly, in the case of film or video material which falls within tier three the application of a classification or rating system, with attendant warnings and entrance restrictions, would seem to us the most satisfactory way of dealing with the display problem. In the case of hard copy material, especially magazines, we believe that municipal regulation requiring warnings, barriers, or opaque covers is an appropriate method of responding. Provincial law and municipal by-laws of the type mentioned above would also have application to tier two material which is protected by the defences of genuine educational or scientific purpose or artistic merit.

#### **Recommendation 5**

**Controls on pornographic material should be organized on the basis of a three-tier system. The most serious criminal sanctions would apply to material in the first tier, including a visual representation of a person under 18 years of age, participating in explicit sexual conduct, which is defined as any conduct in which vaginal, oral or anal intercourse, masturbation, sexually violent behaviour, bestiality, incest, necrophilia, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals is depicted. Also included in tier one is material which advocates, encourages, condones, or presents as normal the sexual abuse of children, and material which was made or produced in such a way that actual physical harm was caused to the person or persons depicted.**

Less onerous criminal sanctions would apply to material in the second tier. Defences of artistic merit and educational or scientific purpose would be available. The second tier consists of any matter or performance which depicts or describes sexually violent behaviour, bestiality, incest or necrophilia. Sexually violent behaviour includes sexual assault, and physical harm depicted for the apparent purpose of causing sexual gratification or stimulation to the viewer, including murder, assault or bondage of another person or persons, or self-infliction of physical harm.

Material or productions in the third tier would attract criminal sanctions only when displayed to or performed before the public without a warning as to their nature or sold or made accessible to people under 18. Unsolicited mail incorporating such material is also included. In tier three is visual pornographic material or performances in which are depicted vaginal, oral, or

anal intercourse, masturbation, lewd touching of the breasts or the genital parts of the body or the lewd exhibition of the genitals, but no portrayal of a person under 18 or sexually violent pornography is included.

#### Recommendation 6

The provinces and the municipalities should play a major role in regulation of the visual pornographic representations that are not prohibited by the Criminal Code through film classification, display by-laws and other similar means. The provinces should not, however, attempt to control such representations by means of prior restraint.

## 5. Offences Relating to Pornographic Material

### 5.1 Section 159

The basis upon which we have constructed this replacement for section 159 has been discussed in the first part of this chapter, and so we will not repeat it here. However, we do wish to highlight certain features of the proposed legislation.

The first thing to note is the terminology we have used. We have tried for the most part to be specific in our choice of terminology, avoiding the use of vague words such as “degrading”. As a result, we have drafted our offences in terms of descriptions of certain kinds of acts. The offences in relation to tier two material, for example, contain a list of acts like incest, bestiality and necrophilia. These acts are, in and of themselves, criminal offences. The term “sexually violent behaviour”, which also appears in the list, is defined to include “physical harm depicted for the apparent purpose of causing sexual gratification to or stimulation of the viewer”. This general part of the definition recognizes that the element of context has an important role to play in determining whether portrayals of physical harm are wrongful. More especially, it embraces the combination of violence and sexual conduct, and violence and sexual stimulation which we consider to be so destructive of the dignity and worth of human beings in general, and women in particular. To supplement the general formulation, we have given specific examples, like murder, and self-inflicted harm. All of the elements of this list except for self-inflicted harm are, once again, crimes. We include self-inflicted harm because it is typically portrayed in a context which makes it appear that the actor, usually a woman, enjoys and deserves the pain. This we see as just as objectionable as the representation of physical violence by others, which suggest the legitimacy of such conduct, and worse still, its acceptance by the victim. By thus staying close to what is itself criminal in formulating our definition, we hope to avoid making it so broad that it would catch images which, while perhaps objectionable, should not be criminalized. We wish to note in this connection the two definitions of “visual pornographic material” which appear in the proposed section. One of them, which applies in the case of section 159(1), reflects both the sexually explicit and the sexually violent. However, when we come to define “visual pornographic material” in dealing with the offence of displaying tier three material, we have removed from the



definition the phrases sexually violent behaviour, necrophilia, incest and bestiality. We also specify that this class of representations does not include pornographic representations of children, material advocating the sexual abuse of children, or material in which it appears that harm was done to the participants.

In drafting the offences to deal with tier one and tier two material, we have maintained the distinction now made in section 159 of the *Code* between those who produce and distribute prohibited material and those who are involved in the retail trade in such material. In our view, a distinction along these lines is appropriate in this area for two reasons. First, it allows for recognition to be given in the *Code* to the fact that producers and distributors of material of this kind are in a better position to know its content than are retailers. Recognition of this fact, which is now reflected in section 159(6) (i.e. that ignorance of the nature or presence of the material is no defence) we have embodied in both a new section 159(5) and a new section 159(6). The former is a slightly revised version of the existing 159(6); it provides that it is no defence for a producer or distributor to show that he was ignorant of the character of the “matter or thing” in question. The latter makes provision for a “due diligence” defence for retailers.

The “due diligence” defence is intended to protect the responsible merchant who tried to review the materials coming into his establishment, and to comply with the law. We realize that merchants are not going to be able to interpret in every case what is and is not within the section. However, the fact that they have tried will be of help in the event of a prosecution. The conduct we wish to deter is that of the merchant who accepts without question any material provided by a distributor, and pays no attention to those whose rights are adversely affected by it.

The second reason for distinguishing between producers and distributors on the one hand, and retailers on the other, lies in the need to ensure that the punishment fits the crime. In our view, the production and distribution of prohibited material has to be treated more harshly than the retail trade in it. It is well known that it is in the production and distribution of this material that the real profits are made, and the penalties for such activities must be severe if the law is to have any significant deterrent effect.

In proposing that this distinction is to be continued, the Committee has not forgotten that the Ontario Court of Appeal has held that the existing section 159(1)(a) and section 159(2)(a) overlap to some extent.<sup>5</sup> It is clear that, to the extent that these two offences do overlap, the purposes underlying the distinction are defeated. We have attempted to deal with this problem both by making it clear that the rental of prohibited material is caught by the retailing offence and by removing the word “circulates” from the producing and distributing offence. We are not overly confident, however, that these changes will succeed in overcoming the Ontario Court of Appeal’s decision. It may be, therefore, that further changes to the language used in these sections will be necessary.



It will be noted that in our formulation of section 159(2), Sexually Violent and Degrading Pornography, we have included the defences of genuine educational or scientific purpose, and artistic merit. It is important that we state our reasons for these exceptions which are contained in section 159(2)(d) and (c).

The defence of genuine educational a scientific purpose reflects our belief that in certain contexts the production, distribution and sale of this material may be quite legitimate. While descriptions of incestuous relationships of the sort described in some entertainment magazines are clearly not tolerable very detailed descriptions of incestuous relations, perhaps with explicit photographs of the physical harm done to a young victim of incest by an adult, are entirely appropriate within a medical setting or the training of professionals who work with families in trouble. Here the material is acceptable or unacceptable not on the basis of what it describes or depicts but on the basis of its purpose. However, materials produced for genuine educational or scientific purposes may be sold for less noble reasons. We have provided for this contingency by relating the defence in the case of retailers both to the original purpose of the material and the purpose of its sale.

Some people will argue that there can be no such thing as an artistic defence of material which is sexually violent. Because the depiction meets some academic or elitist concept of artistic does not make it any more acceptable. While we have sympathy with this view we consider it essential to provide for such a defence in order properly to balance the competing rights of equality and freedom of speech. Both of these are entrenched in the *Charter* and clearly the law cannot be used to support one to the total exclusion of the other. Artistic and literary endeavours are a vital component of our society and as such have to be protected and encouraged. That they sometimes raise uncomfortable questions, treat controversial topics and present unpopular views is to be expected. It would not be acceptable to us to say that the matters dealt with in the second tier cannot be presented in artistic works. Indeed, to say so would be to put a significant range of artistic and literay material dating back to antiquity at risk. We wonder, for example, how these two ancient Greek classics, "Oedipus Rex" and "Electra", and the work of the Roman historian Suetonius would fare without such a defence. In some cases the need to protect freedom of expression must predominate.

We note in passing that the Committee has considered two different approaches to artistic works that might fall within the ambit of our second tier. On the one hand, it can be argued that because the work in question is, indeed, artistic, its message is different from, for example, the message in a similar depiction or description in an "adult entertainment" magazine. The fact that it is art, on this view, transforms the depiction or description into something which is no longer harmful. On the other hand, it might be said that both the artistic work and the adult magazine contain an equally harmful message but that in the former case the genre is of sufficient importance that we will nevertheless protect it. While the Committee has adopted this latter view, it should be noted that the question of whether works of art can be pornographic

or whether those terms are mutually exclusive has been the subject of considerable discussion in academic literature.

We recognize, of course, that these defences, especially that of artistic merit, introduce a subjective element into the determination of what is pornographic for the purposes of the criminal law. Given our concern to strike a balance between the protection of equality rights, and freedom of expression, we cannot see how that can be avoided. Moreover, we are of the view that decision makers with the benefit of the evidence of expert witnesses will have less of a problem distinguishing what is artistic from what is not than they do with applying the present slippery test of what is obscene. Instead of trying to define the answer to the broader question of what the Canadian community would consider tolerable, they will have to reach a determination of artistic worth by considering the producer or maker's purpose, together with its status within the artistic or literary community. While this will no doubt be a challenging task, we think that it will be a manageable one. The process of decision making is certainly assisted by section 159(2)(h) which establishes the contexts in which the impugned material is to be judged and differentiates them depending upon whether the material is part of a more extensive production or story, or merely a detached segment.

We have included within section 159(2)(c) a display provision relating to Sexually Violent and Degrading Pornography. We think it important to distinguish this method of dealing with proscribed pornographic material from its sale and rental, in particular because it is necessary to provide for material which falls within the exceptions allowed by section 159(2)(d) and (e). It would obviously not make sense for material which, were it not for its purpose or character, would be proscribed, to be displayed openly and without regulation.

It will be noted that in relation to both exempted sexually violent and degrading material by section 159(2)(g) and tier three material by section 159(3)(b) we have stipulated that no one shall be convicted of the offences where an adequate warning notice has been located where it can be seen by those entering the premises or part of the premises which contain pornographic material. The Committee considered whether an exemption should be included for museums, art galleries and the like. Some of its members felt a little disconcerted by the realization that establishments like the Royal Ontario Museum, for instance, might be required to post warning notices because of concern about the possibility of pornography lurking within their walls. Attempts to draft such an exemption floundered on the issue of how to ensure that the exemption would only be available to legitimate establishments of this type. For this reason an exception has not been included.

The penalties provided in the draft section are intended to reflect our view of the seriousness of these offences. Many of them are higher than the penalty now provided for breach of section 159. Where possible, we have specified the amount of the fine which can be imposed by a court convicting someone of a summary conviction offence. Subsection 722(1) of the *Code* provides that



where there is no other provision made by law, a fine of \$500 or six months imprisonment or both can be imposed for a summary conviction offence. While we have no objection to the six months imprisonment, and reflect that in our sections, we consider that the maximum fine of \$500 was far too low. In some cases, we have made that a minimum fine.

Because of the provisions of paragraph 647(b) of the *Code*, we cannot impose these higher penalties upon a corporation convicted of a summary conviction offence. Elsewhere, in Part IV on Children, we recommend that paragraph 647(b) be amended, so as to provide for a higher penalty for a corporation convicted of a summary conviction offence, or to allow the drafter to attach to any particular offence a penalty higher than that set out in paragraph 647(b).

We have, however, provided for a penalty against an officer of a corporation who is implicated in the commission of the offence. We believe this to be essential in making it clear that legal responsibility for the production, distribution, sale, rental or display of this material is both a personal and a corporate responsibility. More particularly it obviates the possibility that the human agents in dealing with the material will try and shield themselves by shifting responsibility to the corporate entity.

Finally, we have incorporated a forfeiture provision in proceedings under section 159(1)(a) and (b) and 159(2)(a) and (b) which allows the Crown to dispose of offensive materials and copies thereof. This power is important, if the full implications of a conviction are to be realized. Without it, it would be all too easy for other distributors or retailers to continue dealing in the material which had produced a conviction, leaving to the Crown the sole recourse of further prosecutions.

#### **Recommendation 7**

**Section 159 of the Criminal Code should be repealed, and replaced with the following provision:**

##### **PORNOGRAPHY CAUSING PHYSICAL HARM**

**159(1)(a) Everyone who makes, prints, publishes, distributes, or has in his possession for the purposes of publication or distribution, any visual pornographic material which was produced in such a way that actual physical harm was caused to the person or persons depicted, is guilty of an indictable offence and liable to imprisonment for five years.**

**(b) Everyone who sells, rents, offers to sell or rent, receives for sale or rent or has in his possession for the purpose of sale or rent any visual pornographic material which was produced in such a way that actual physical harm was caused to the person or persons depicted is guilty**

**(i) of an indictable offence and is liable to imprisonment for two years, or**

**(ii) of an offence punishable on summary conviction and is liable to a fine of not less than \$500 and not more than \$2,000 or to imprisonment for six months or to both.**

**(c) “visual pornographic material” includes any matter or thing in or on which is depicted vaginal, oral or anal intercourse, sexually violent behaviour, bestiality, incest, necrophilia,**



masturbation, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals.

#### **SEXUALLY VIOLENT AND DEGRADING PORNOGRAPHY**

**159(2)(a)** Everyone who makes, prints, publishes, distributes or has in his possession for the purposes of publication or distribution any matter or thing which depicts or describes:

- (i) sexually violent behaviour;
- (ii) bestiality;
- (iii) incest, or
- (iv) necrophilia

is guilty of an indictable offence and liable to imprisonment for five years.

**(b)** Everyone who sells, rents, offers to sell or rent, receives for sale or has in his possession for the purpose of sale or rent any matter or thing which depicts or describes:

- (i) sexually violent behaviour;
- (ii) bestiality;
- (iii) incest, or
- (iv) necrophilia

is guilty

- (i) of an indictable offence and is liable to imprisonment for two years, or
- (ii) of an offence punishable on summary conviction and is liable to a fine of not less than \$500 and not more than \$1,000 or to imprisonment for six months or to both.

**(c)** Everyone who displays any matter or thing which depicts or describes:

- (i) sexually violent behaviour;
- (ii) bestiality;
- (iii) incest; or
- (iv) necrophilia

in such a way that it is visible to members of the public in a place to which the public has access by right or by express or implied invitation is guilty of

- (i) an indictable offence and is liable to imprisonment for two years, or
- (ii) an offence punishable on summary conviction and is liable to a fine of not less than \$500 and not more than \$1000 or to imprisonment for six months or to both.

**(d)** Nobody shall be convicted of the offence in subsection (2)(a) who can demonstrate that the matter or thing has a genuine educational or scientific purpose.

**(e)** Nobody shall be convicted of the offence in subsection (2)(b) who can demonstrate that the matter or thing has a genuine educational or scientific purpose, and that he sold, rented, offered to sell or rent or had in his possession for the purpose of sale or rent the matter or thing for a genuine educational or scientific purpose.

**(f)** Nobody shall be convicted of the offences in subsections (2)(a) and (2)(b) who can demonstrate that the matter or thing is or is part of a work of artistic merit.

**(g)** Nobody shall be convicted of the offences in subsection (2)(c) who can demonstrate that the matter or thing

- (i) has a genuine educational or scientific purpose; or
- (ii) is or is part of a work of artistic merit,

and

(iii) was displayed in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advising of the nature of the display therein,

- (h) In determining whether a matter or thing is or is not part of a work of artistic merit the Court shall consider the impugned material in the context of the whole work of which it is a part in the case of a book, film, video recording or broadcast which presents a discrete story. In the case of a magazine or any other composite or segmented work the court shall consider the impugned material in the context of the specific feature of which it is a part.

#### **DISPLAY OF VISUAL PORNOGRAPHIC MATERIAL**

159(3)(a) Everyone who displays visual pornographic material so that it is visible to members of the public in a place to which the public has access by right or by express or implied invitation is guilty of an offence punishable on summary conviction.

- (b) No one shall be convicted of an offence under subsection (1) who can demonstrate that the visual pornographic material was displayed in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advising of the display therein of visual pornographic material.
- (c) For purposes of this section “visual pornographic material” includes any matter or thing in or on which is depicted vaginal, oral or anal intercourse, masturbation, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals, but does not include any matter or thing prohibited by subsections (1) and (2) of this section.

#### **FORFEITURE OF MATERIAL**

159(4) In any proceedings under section 159(1)(a) and (b), 159(2)(a) and (b), and 164, where an accused is found guilty of the offence the court shall order the offending matter or thing or copies thereof forfeited to Her Majesty in the Right of the Province in which proceedings took place, for disposal as the Attorney General may direct.

#### **ABSENCE OF DEFENCE**

159(5) It shall not be a defence to a charge under sections 159(1)(a) and 159(2)(a) that the accused was ignorant of the character of the matter or thing in respect of which the charge was laid.

#### **DUE DILIGENCE DEFENCE**

159(6) Nobody shall be convicted of the offences in sections 159(1)(b) and 159(2)(b) who can demonstrate that he used due diligence to ensure that there were no representations in the matter or thing which he sold, rented, offered for sale or rent, or had in his possession for purposes of sale or rent, which offended the section.

#### **DIRECTORS**

159(7) Where an offence under this section committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.



## DEFINITIONS

159(8) For purposes of this section, “sexually violent behaviour” includes

- (i) sexual assault,
- (ii) physical harm, including murder, assault or bondage of another person or persons, or self-infliction of physical harm, depicted for the apparent purpose of causing sexual gratification to or stimulation of the viewer.

## 5.2 Section 160

Section 160, the forfeiture provision of the *Code*, received little comment either at the public hearings or in the briefs submitted to the Committee. Such comment as there was tended to be general in nature. Some groups thought that section 160 should be repealed because it amounted to a general power to censor. Other groups thought that it should be retained and, in fact, used more often than it is.

The Committee is of the view that section 160 should be retained, at least insofar as tier one and tier two materials are concerned. In other words, taking forfeiture proceedings against the material itself should continue to be an alternative to a criminal charge with respect to material involving children, material advocating or encouraging the sexual abuse of children, pornography produced in such a way as to cause physical harm and sexually aggressive and degrading pornography. It would not be an option with respect to material that is in tier three. The reason for this distinction is explained below.

There are three reasons why we think that a provision like section 160 should remain in the *Criminal Code*. The first is that it provides a speedy way of resolving the question of whether or not material is in fact prohibited. The second is that it allows for that question to be resolved in proceedings in which there is no risk of anyone being convicted of a criminal offence. The third is that it provides private citizens with a useful and effective alternative to a private prosecution in situations in which, for one reason or another, the government has refused to act.

The second and third of these reasons require some explanation. In cases where it is clear that the material in question is prohibited, the Committee is of the view that criminal charges should be laid as quickly as possible. However, we agree with the opinion expressed by Judge Borins in *Regina v. Nicols* that, in cases where it is difficult to know whether the material in question is prohibited, there is an element of unfairness in proceeding by way of criminal charges. In those cases, which the committee hopes would be few and far between under the regime it is proposing, section 160 proceedings would be appropriate.

Insofar as the third reason is concerned, our public hearings revealed that there was a great deal of dissatisfaction about the reluctance of law enforcement officials in some provinces to take action against material that some



members of the public considered clearly to be obscene. In the Committee's view, a provision like section 160 should be available to private citizens so that they can act in situations where the government will not. We realize that a power such as this in the hands of private citizens is open to abuse. However, close scrutiny of the information upon oath which forms the basis of the application for a warrant to seize the material, should catch the obvious abuses. If it was deemed necessary, express provision could be made in the section for a power on the part of the Attorney General to stay proceedings in order to catch those abuses which surmounted this initial hurdle.

The Committee's reasoning on this point assumes that section 160, as it now reads, allows private citizens to initiate proceedings under it. As was noted in our discussion of the existing law, the courts appear to have accepted that it does. However, the point does not appear to have been argued and it may be advisable to make it clear that private citizens can invoke the section.

Two additional points about section 160 should be noted. The first is that, although the courts have accepted that the onus is on the Crown under section 160 to prove beyond a reasonable doubt that the material in question is obscene, the language of the provision suggests that the onus is on the other side to prove that it is not obscene. The Committee recommends that the section be amended to make it clear that the onus is on the Crown in such cases.

The second point relates to the use of juries in section 160 cases. At present, section 160 "show cause" hearings are heard by a judge alone. The Committee gave serious consideration to recommending that the party defending the material should be allowed to elect to have the case heard by a judge and jury. The rationale for such a recommendation would have been a desire to minimize the differences in the way in which criminal prosecutions (at least those commenced by indictment) and section 160 cases were handled. In the result, however, the Committee decided against making such a recommendation. Trial of section 160 cases by juries would make proceedings more lengthy and one of the main advantages of the section would be lost.

It will be recalled that the recommendation that section 160 be retained contained the proviso that its application should be limited to prohibited material. The reason for this is that, in the case of regulated material, the concern is with the circumstances of the sale or display, rather than with the material itself. Forfeiture proceedings in respect of such material would seem to make little sense.

#### **Recommendation 8**

**Section 160 of the Code, allowing forfeiture proceedings to be brought, as an alternative to a criminal charge, should be retained in the Code but its application should be limited to tier one and tier two material.**

#### **Recommendation 9**

**To clarify the law on this point, section 160 should be amended to make it clear that the onus rests on the Crown under this section to prove beyond a reasonable doubt that the material comes within either tier one or tier two.**

## 5.3 Section 161

### Recommendation 10

**Section 161 of the Code should be amended as follows:**

**161. Everyone who refuses to sell or supply to any other person copies of any publication for the reason only that such other person refuses to purchase or acquire from him copies of any other publication that such other person is apprehensive may offend section 159(1) or section 159(2) of the Code is guilty of an indictable offence and is liable to imprisonment for two years.**

This recommendation really changes little from what the section now provides. At present, the reference is the person's apprehension that the material might be "obscene or a crime comic". The change merely reflects the repeal of section 159 and enactment of the new provisions.

## 5.4 Section 162

It will be recalled that section 162 deals with the publication of reports of judicial proceedings. The section contains a general prohibition against the publishing of "indecent matter or indecent medical, surgical or physiological details, being matter or details that, if published, are calculated to injure public morals", as well as a more specific prohibition relating to divorce, judicial separation and nullity proceedings. In respect of the latter kind of proceedings, it is made an offence to publish anything other than names and addresses, concise statements of the charges, defences, legal submissions, the judge's summing up, the jury's findings and the court's decision.

The Committee is of the view that section 162 should be repealed. It most certainly cannot be sustained on the basis of the need to protect public morals. That may have been an adequate rationale in 1926 when the British legislation upon which section 162 was based was enacted. It is not an adequate rationale today. Moreover, it is difficult to see why "indecent matter [and] indecent medical, surgical or physiological details" that find their way into judicial proceedings should be deserving of special treatment in the law.

To the extent that there may be a concern about the privacy and other interests of participants in judicial proceedings, including witnesses, it may be appropriate to empower the judge to make a specific order with respect to the non-publication of certain matters arising during those proceedings. A model for such a provision might well be section 467 of the *Criminal Code*, which empowers a judge to ban the publication of evidence taken at a preliminary hearing. If broader protection for those interests is thought to be necessary, consideration might be given to enacting a provision along the lines of section 246.6(4), which prohibits the publication of the evidence of the sexual activity of a complainant in a sexual assault case.

Whatever the form such a provision would take, its purpose would be to protect the interests of those involved in the judicial proceedings. The provision



would not be based on a concern that the content, pornographic or otherwise, of the information conveyed might be harmful to those who read or see it. For this reason, the provision would not belong in the part of the *Criminal Code* that deals with pornography.

#### **Recommendation 11**

**Section 162 of the Code should be repealed.**

### **5.5 Section 164**

#### **Recommendation 12**

**Section 164 of the Code should be repealed and replaced by:**

##### **MAILING PORNOGRAPHIC MATERIAL**

**164(1) Everyone who makes use of the mails for the purpose of transmitting or delivering any matter or thing which:**

- (a) depicts or describes a person or persons under the age of 18 years engaging in sexual conduct,**
- (b) advocates, encourages, condones, or presents as normal the sexual abuse of children**

**is guilty of an indictable offence and liable to imprisonment for ten years.**

**(2) Everyone who makes use of the mails for the purpose of transmitting or delivering any matter or thing which:**

- (a) by virtue of its character gives reason to believe that actual physical harm was caused to the person or persons depicted, or**
- (b) depicts or describes:**
  - (i) sexually violent behaviour,**
  - (ii) bestiality,**
  - (iii) incest, or**
  - (iv) necrophilia**

**is guilty of an indictable offence and liable to imprisonment for five years.**

**(3) Everyone who makes use of the mails for the purpose of transmitting or delivering unsolicited visual pornographic material to members of the public is guilty of an offence punishable on summary conviction.**

**(4) Nobody shall be convicted of the offence in subsection (2)(b) who can demonstrate that the matter or thing mailed**

- (i) has and is being transmitted or delivered for a genuine educational or scientific purpose, or**
- (ii) is or is part of a work of artistic merit.**

**(5) It shall not be a defence to a charge under subsections (1) and (2) of this section that the accused is ignorant of the character of the matter or thing in respect of which the charge was laid.**

**(6) For purposes of this section “visual pornographic material” includes any matter or thing in or on which is depicted vaginal, oral or anal intercourse, masturbation, violent behaviour, incest, bestiality, necrophilia, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals.**

The new section 164 incorporates the changes made to section 159 and covers all three tiers. As we consider the retailers of tier one and two material



as the equals in the production, distribution chain to the makers, printers, publishers and distributors referred to in section 159 (1)(2) and 159 (2)(a), we have concluded that ignorance of content should similarly not constitute a defence (section 164(5)). Moreover, the same maximum penalty should apply as is prescribed by section 159 (1)(a) and (2)(a).

In tune with our general approach to tier two material we have included the defences of genuine educational and scientific purpose, and artistic merit in section 164(4). It will be noted that in respect of the former the defence relates to both the nature of the material and the purpose of its mailing.

We include an offence of mailing unsolicited visual pornographic material in section 164(3). This is in essence the equivalent of the display provisions in section 159(3). The definition of “visual pornographic” material in section 164(b) has been framed to include “sexually violent behaviour, bestiality, incest or necrophilia”, as the offence should embrace not only those materials which fall within tier three, but also those tier two materials which were covered by the defences in section 164(4). Members of the public need, in our opinion, to be protected from unsolicited transmittal of this type of material as they do from tier three material.

## 5.6 Section 165

Section 165 of the present *Code* establishes the manner of proceeding under, and the penalties for breach of, the *Code* sections dealing with publication, distribution and sale, tied sales, judicial proceedings, theatrical performances and use of the mails. As the sections we recommend have specific penalties attached, repeal of this section is in order.

### Recommendation 13

**Section 165 of the Criminal Code should be repealed.**

## 6. Offences Relating to Pornographic Performances

### 6.1 Section 163

We have adopted the same approach to the control of live pornographic performances that we have taken to the control of pornographic material. Hence, the provision which we recommend be included in the *Criminal Code* in the place of the existing section 163 is divided into three different offences, one to deal with live performances that fit the description of tier one material, (section 163(1)) one to deal with live performances that fit the description of tier two material, (section 163(2)) and one to deal with live performances that fit the description of tier three material, (section 163(3)).

It may be thought to be unnecessary in the case of live performances to include an offence for those performances that involve actual physical harm. For, if physical harm is, in fact, caused in such a performance, those responsible for such harm can be dealt with under the assault provisions of the *Criminal Code*. In our view, the justification for including this offence lies in the concern the Committee has that an accused may be able to argue under an assault charge that the performer consented. Given what will sometimes be a very unequal relationship between employer and employee and scant respect on the part of the former for the rights and sensitivities of the latter, this concern is not entirely fanciful. The provision also attempts to ensure that those who put on productions which involve tier two material, but which attract the defence of artistic merit limit themselves to simulation. Over and above the actual harm being caused is of course the odious message which is transmitted by such performances.

With respect to live performances that fit the description of tier two material, there is a defence of artistic merit in section 163(5). Because we are in the realm of public display, however, an accused would be obliged to show not only that the performance had artistic merit, but also that the performance took place in premises containing an adequate warning. Live performances that fit the description of tier three material would be permitted under this proposal, provided they took place behind an adequate warning (section 163(3)). By section 163(4) ignorance of the nature of the performance is no defence to charges under section 163(1) and (2).

We are well aware that these proposals would produce a significant change in the law in this area, since it would mean that "live sex" shows would no longer be criminalized. We did not feel, however, that a criminal prohibition against such shows could be justified under any of the rationales that we have given for the other *Criminal Code* prohibitions we have recommended. Nor, in our view, could any other convincing rationale be found. Given our decision that tier three material should not be proscribed, a prohibition against the equivalent kind of live performance would have to be justified on the basis that live performances have some special quality about them that sets them apart from magazines, books, films and videos. The Williams Committee concluded that the physical presence of those involved in the sexual activity gave live performances a special quality. As they put it in their report, that presence results in a relationship between actual people that gives rise to "the peculiar objectionableness that many find in the idea of the live sex show, and the sense that the kind of voyeurism involved is especially degrading to both audience and performers." On this basis, the Williams committee concluded that live shows featuring actual sexual activity should be prohibited.

The difficulty we have with this line of reasoning is that even if one accepts that the idea of live sex shows may be objectionable to many and that the shows themselves may be degrading to both the performers and the audience, these are inadequate reasons for prohibiting such shows. The fact that people object to a particular activity is, in and of itself, no reason for making it illegal. Neither is the fact that those involved in it, provided they are adults, are degraded (whatever that may mean) by virtue of their involvement.



The fact that “live sex” shows would no longer be prohibited would not, of course, mean that they would not be subject to any regulation at all. We have already recommended that provinces and municipalities should play a major role in the regulation of pornographic material that falls into tiers two and three. We make the same recommendation here with respect to live performances of a sexual character. Both the power to regulate local businesses and the power to zone can and should be used to good effect in this area.

#### **Recommendation 14**

**Section 163 of the Code should be repealed and replaced by:**

##### **LIVE SHOWS**

**163 (1) Everyone who, being the owner, operator, lessee, or manager, agent or person in charge of a theatre of any other place in which live shows are presented, presents or gives or allows to be presented or given therein a performance which advocates, encourages, condones or presents as normal the sexual abuse of children is guilty of an indictable offence and liable to imprisonment for ten years.**

**(2) Everyone who, being the owner, operator, lessee, manager, agent or person in charge of a theatre or any other place in which live shows are presented, presents or gives or allows to be presented or given therein a performance which**

**(a) involves actual physical harm being caused to a person participating in the performance, or**

**(b) represents:**

**(i) sexually violent behaviour;**

**(ii) bestiality;**

**(iii) incest; or**

**(iv) necrophilia**

**is guilty of an indictable offence and liable to imprisonment for five years.**

**(3) Everyone who, being the owner, operator, lessee, manager, agent or person in charge of a theatre or any other place in which live shows are presented, presents, or gives, or allows to be presented or given therein without appropriate warning a performance in which explicit sexual conduct is depicted is guilty of an offence punishable on summary conviction.**

**(4) It shall not be a defence to a charge under subsections (1) and (2) that the accused was ignorant of the character of the production.**

**(5) Nobody shall be convicted of the offence under subsection (2) (b) who can demonstrate that**

**(i) the performance is or is part of work of artistic merit; and**

**(ii) the performance was presented or given in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advising of the nature of the performance.**

**(6) For purposes of subsection 3 it shall be sufficient to establish that an appropriate warning was given that the performance was presented or given in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advising of the nature of the performance.**

**(7) For purposes of subsection 3 “explicit sexual conduct” includes vaginal, oral or anal intercourse, masturbation, lewd touching of the**



**breasts or the genital parts of the body, or the lewd exhibition of the genitals.**

**Recommendation 15**

**The provinces and the municipalities should play a major role in regulation of live performances involving sexual activity that are not prohibited by the Criminal Code, through licensing, zoning and other similar means.**

## 6.2 Section 170

**Recommendation 16**

**Section 170 of the Criminal Code should be amended to add the following provision:**

**This section has no application to a theatre or other place licensed to present live shows**

Section 170 penalizes nudity in a public place without lawful excuse. The purpose of this exemption is to ensure that live performances will be proceeded against under section 163 of the *Code*, rather than this provision. As we have seen in our analysis of the present *Criminal Code* provisions on pornography in Chapter 7 of Section II, section 170 has been held to be applicable to theatrical performances notwithstanding the existence of specific offences relating to theatrical performances in section 163. We are of the opinion that to leave it open to the Crown to proceed under section 170 would be to allow an unwarranted departure from the three tier structure which we have developed.

## Footnotes

- <sup>1</sup> See Law Reform Commission of Canada, *Limits of the Criminal Law, Obscenity: A Test Case*, Ottawa, 1975; Department of Justice, *The Criminal Law in Canadian Society*, Ottawa, 1982.
- <sup>2</sup> *R. v. Keegstra*, November 5, 1984 [unreported] (Alta Queen's Bench).
- <sup>3</sup> *Ibid*, at 22.
- <sup>4</sup> *Ibid*.
- <sup>5</sup> *R. v. National News*, 1957, 118 C.C.C. 152 (Ont. Ct. of Appeal).





## Chapter 21

# Canada Customs

Our recommendations are divided into two categories, legal and administrative.

### 1. Legal

#### Recommendation 17

**The amendments we have proposed to the Criminal Code with respect to proscribed pornographic material should be incorporated by reference into the list of goods prohibited entry into Canada by Schedule C of the Customs Tariff and incorporated by reference into the Customs Act.**

We are of the view that our description of proscribed pornographic material in the *Criminal Code* should be incorporated by reference in all other federal legislation which attempts to regulate such material. It will be essential to do so if we are to achieve the kind of concerted and consistent regulatory effort needed to deal with pornographic material. There must be a common understanding of what kind of material should be regulated and controlled.

As we have indicated in the course of our discussion of the Customs legislation in Section II, chapter 9, the existing qualitative words used to describe the character of what pornographic material is to be regulated by Customs, are “immoral or indecent”. We want to be careful to point out (as we have in other areas), that while the incorporation of our *Criminal Code* recommendations concerning proscribed pornographic material into Customs legislation will more clearly define the material for those who are asked to classify it, our recommendations deal only with material that contains some kind of sexual activity. They do not extend to those materials which are, for example, violent and/or disgusting, but lacking in any depiction or description of sexual activity. The possibility exists that this kind of material is covered by the present description of “immoral or indecent” in *Tariff* item 99201-1. The short point is that the simple exchange of our criminal law recommendations with respect to pornographic material for the words of the present *Tariff* item, will leave out material that Canadians or their government or their regulators may want to prohibit from entry into Canada.

### **Recommendation 18**

**If, in administering the Customs Tariff, it becomes necessary for Customs to formulate descriptions of pornographic material more precisely than do our Criminal Code recommendations, Customs should put such formulations in the form of Regulations rather than internal policy guidelines or memoranda.**

In order to better administer the *Tariff*, Customs may wish to formulate more precisely or more comprehensively descriptions of pornographic material. We do not think, however, that such formulation should be put in the form of policy guidelines or interpretive intra-departmental memoranda. We think, instead, that Customs should pass Regulations for posting at all regional offices. The Regulations should also be available to interested members of the public upon the payment of an appropriate fee. In our view, Regulations should be passed only after they have been published as proposals seeking public comment. This practice has been used to advantage by other regulators (notably the Canadian Radio-Television & Telecommunications Commission) as a useful vehicle to obtain public involvement and response.

Regulations can, of course, be amended if practice and experience requires. The fact that the contents of Regulations are public and easily accessible will help to ensure that interested members of the public are informed and appropriate pressure can be brought to amend the Regulations when necessary. The same advantages do not exist with respect to intra-departmental guidelines and memoranda.

### **Recommendation 19**

**The Criminal Code should be amended to provide that it be an offence to import into Canada pornographic material proscribed by the Criminal Code.**

For the reasons that follow, we have concluded that it should be a criminal offence to import certain kinds of pornographic material. We point out that if our recommendations with respect to inclusion in the *Criminal Code* of various kinds of pornographic material are accepted, the offence of importing should extend only to that material that is proscribed, not the material that is regulated in terms of display and its availability to children.

Under the current regime, an importer of goods who is prepared to seek Customs clearance faces no risk if the goods are declared to be prohibited. The consequences of such a declaration are that the goods are returned to their source or are destroyed if abandoned by the importer.

It is only when an importer brings in goods which he fails to declare that a risk of criminal sanction arises under the *Customs Act* and the *Customs Tariff*.

As we have indicated in the chapters of this Report that describe the sources of pornographic material, it is clear that the vast majority of it comes from outside Canada. Under the present state of the criminal law, there is no real disincentive to the flow of material into Canada. It seems clear that the existing sanctions are, and will continue to be, inadequate to stop this flow.



The parallels between the pornography and the narcotics industries are compelling. The law has acted to attempt to address the problem of narcotics at the point where the material enters the country.<sup>1</sup> The sanction that the criminal law places on the act of importing narcotics has, in the opinion of many law enforcement officials, acted as a deterrent and has done much to stem the tide of narcotics. For some of the same reasons, we have considered the suggestion that the *Criminal Code* be amended to make it an offence to import the worst kinds of pornographic material into Canada.

The first concern that arises in making the importation of pornographic material an offence, is that by doing so we would be putting a premium on the material that is then produced in Canada. It would be a cruel irony if the result of creating the offence of importing pornographic material was to develop a domestic production industry. While we are sure that production would undoubtedly increase in Canada, we think that there are some factors which would confine that increase. Firstly, law enforcement authorities could anticipate the increase and tailor their efforts to respond to it. Pornographic material has caused sufficient concern within the country that producers cannot count on the apathy of either the public or law enforcement officials to insulate them from investigation and detention.

Secondly, the consumers of pornography are used to being able to acquire a product that is technically well produced. We assume that it would, therefore, take considerable investment to match the product that has traditionally been reaching the marketplace in Canada. That investment would, of course, be at risk upon detection.

Additional concerns arise when considering what defences could arise to a charge of importing. For example, should the mere fact of a Customs clearance be a complete defence?

On the basis of what we know of the operations of Canada Customs, it is clear that a huge volume of pornographic material goes undetected. We know that large shipments can be checked only randomly and that the illegal material could easily be secreted within a shipment of other goods. We also know that the largest portion of imported goods is cleared without any inspection whatsoever.

In these circumstances, we think that the simple fact of a Customs clearance should not be a complete defence to a charge of importing. We do think, however, that the fact of Customs clearance should be taken into consideration in order to determine whether the accused had the necessary guilty intent to commit the offence. For example, there is a great difference between the situation where Customs clearance is given under some mistake of failing to detect the material, and the situation where the material is specifically brought to the attention of a Customs officer and wrongly cleared. In the latter situation, the circumstances under which the clearance was sought and received would obviously be helpful in determining the intent of the accused.



Our criminal law provides that where there is a substantive offence, it will also be illegal to attempt to commit the substantive offence. This raises some further concerns about making importing pornography an offence. Should there be a conviction for attempting to import in those cases where a person declares pornographic material and the material is denied entry? Surely not. The attempt to commit the offence would, however, be complete if a person secreted pornographic material or attempted to enter the goods without proper disclosure.

Taking everything into consideration, we conclude that the *Criminal Code* should be amended by making it an offence to import proscribed pornographic material. It would be open to the Crown to proceed by indictment or summary conviction. The maximum penalty should be two years imprisonment.

#### **Recommendation 20**

**Judges should be entitled to consider at the time of sentencing a person convicted of dealing in one manner or another with proscribed pornographic material that the person disclosed to law enforcement officers the source of the material in question.**

In our discussions with Customs and law enforcement officials, it became clear that information about the source of pornographic material is almost impossible to come by. Yet it is obvious that such information would considerably assist in the effort to control the importation and sale of proscribed or prohibited material. As a way around this difficulty, at least partially, it was suggested to us that the law should somehow oblige a person under investigation for dealing in one way or another with pornographic material to reveal the source of that material.

The objective of such an obligation would clearly be a desirable one. However, there is both a philosophical and a practical reason why, in our view, these suggestions cannot be acted upon. On the philosophical level, there is the concern that the imposition of such an obligation would conflict with the fundamental principle of our law, that persons cannot be compelled to make statements that might tend to incriminate them. If the source of the prohibited material was located in another country, identification of that source by either an accused or a convicted person would indicate that they had imported prohibited goods contrary to the *Customs Tariff* (or, if our third recommendation above were implemented, that they had imported prohibited material). While it is possible to provide that the information given could not be used in subsequent proceedings against the persons giving it, that would likely prove to be of little solace to them. On the basis of the information provided, the Crown might well be in a position to uncover other evidence that is admissible against them and convict them on that basis.

On the practical level, there is the obvious concern that the information given might be false or misleading. Or the person may genuinely not know or be able to identify the person from whom the material was obtained.

We believe that the only viable recommendation that we can make on this matter is that judges be encouraged to take into account at time of sentencing, the fact that the accused disclosed the source of the material. Prosecutors and judges alike would have to be careful that the accused did not mislead them, but if the information can be verified or if there is reason to believe that it is accurate, it seems to us appropriate that the accused should benefit to some extent from his willingness to disclose the information.

## 2. Administrative

The Customs Branch has a complex administrative responsibility. The volume of tariffs, procedures, clearances and sheer paper is enormous. The administration of Customs is further complicated by the fact that it is a national service in a huge country that depends heavily on trade. Canadians are among the most voracious consumers in the world and are proud of their reputation as a sophisticated trading nation. Our demand for goods is consistently high and with it comes corresponding demands on the Customs service.

We do not make these observations as an apology for Customs, but in order to indicate that by the nature of the function they have to perform, Customs is vulnerable to criticism. In one sense, Customs is something of an institutional scapegoat.

Our mandate has not been to conduct an exhaustive study into the administration of the Customs service. Certainly, we have not been able to do so. We have, however, had the chance to meet with Customs officials to ask specific questions about aspects of their service that relate to prohibited goods.

We hope that our suggestions are informed and will not be seen to be gratuitous. Most of our observations and recommendations arise from meeting with Customs officials and observing the process followed by Customs officers.

### **Recommendation 21**

**The federal government should give higher priority than it now does to the control of the importation of pornography.**

In the discussion of the enforcement of Customs legislation, we noted our impression that the inability of Customs to stem the flow of pornography into Canada was due, in part, to the lack of political will. We were advised that greater emphasis has been given by the federal government to the enforcement of the rules and regulations that apply to automobiles and clothing than to the enforcement of Tariff Item 99201-1.

This ordering of priorities is, in our view, unacceptable. Surely it is more important to prevent the entry into Canada of a number of magazines that offend Tariff Item 99201-1 than it is to ensure that an article of clothing reveals its place of origin.



Ideally, the Committee would like to see additional staff taken on by Customs to improve the level of enforcement of Tariff Item 99201-1. Given the current government's program of restraint in government spending, that may not be realistic, however. If that is the case, then personnel and other resources that are now employed in other areas, should be transferred to those departments that have primary responsibility for the enforcement of Tariff Item 99201-1.

Ineffective enforcement of Customs legislation in this area is of particular concern, given that a very high percentage of the pornographic material available in Canada comes from other countries. Many of the people who appeared before us were clearly frustrated by the lack of success that Customs was, and is, having. The recommendation we make should assist in alleviating at least some of this frustration.

#### **Recommendation 22**

**The basic 1977 policy guidelines on the interpretation of prohibited goods should be immediately revised to contain more precise and contemporary formulations of characteristics which must be present to make materials "immoral or indecent".**

The very language used in the current policy guidelines (which are reproduced in the text) indicates the need for reform. The terms presently used in the guidelines reflect a dated notion of the kind of pornographic material that is widely available for distribution. We are aware that the Customs Branch agrees that the guidelines should be reformed and is in the process of doing so.

It is convenient to repeat here the views we expressed earlier about the advantages of using Regulations to give contemporary meaning to statutory language. The publication of proposals prior to the passage of Regulations will undoubtedly allow Customs to benefit from the public's notion of what Canadians currently think should be prohibited as immoral or indecent.

#### **Recommendation 23**

**The jurisdiction to clear film and video recordings for importation into Canada should remain with Canada Customs. The jurisdiction to classify film and video recordings for sale or rent or public showing should remain with the provincial film classification boards.**

#### **Recommendation 24**

**Co-operation between Customs and provincial film classification boards should continue in order that the classification of film and video recordings can take place as part of a single, integrated administrative procedure.**

#### **Recommendation 25**

**Film or video recordings referred by Customs to provincial classification boards should remain in the continuous control of both agencies until the classification and clearance process is complete.**

In Section II, Chapter 14, we have discussed the various reasons which led us to recommend that jurisdiction to classify film and video recordings should



continue to reside with provincial film classification boards. Some of the reasons have to do with the distinctively Canadian issues of culture and language, and others have to do with the immediacy of a relatively local classification system, when compared with what would likely be seen as the remoteness of a national system.

We think that most Canadians want to be able to hold any classifier to account for the decisions that are made. The reasons a classifier may give are perhaps better appreciated when explained in the specific locality where a film or video recording is actually to be shown or sold.

We think the present system of administrative co-operation between Customs and provincial classification boards should be nurtured and continued, and that it serves a useful purpose for the viewing public, the distributors of film and video recordings and, indeed, for Customs and the classification boards.

In order to prevent the possibility of allowing the entire Customs inspection system to be frustrated by the unauthorized copying of material pending ultimate Customs clearance, we conclude that film and video recordings to be classified should remain in the control of Customs until the clearance process is complete.

Specifically we think that the practice followed in Québec of allowing an importer to have custody of the material for classification should be stopped.

#### **Recommendation 26**

**The management information services of Customs should be upgraded to provide an adequate central data base and the ancillary systems necessary to capture, store and retrieve information relating to the importation of prohibited material into Canada.**

#### **Recommendation 27**

**Customs should be adequately equipped to fulfill its responsibilities in contributing to the information flow required for an effective interface between the resources of Customs and law enforcement agencies.**

As we have indicated in the preceding text, the current information system used by Customs is woefully inadequate. The Customs inspection system is highly decentralized and the information gathered from the system is disparate. Customs lacks even an adequate central data base. The information that does exist is difficult to put into the system and time-consuming to retrieve. Commodity specialists and other Customs officers given the responsibility to clear goods, are daily being asked to make quick and consistent decisions to determine if goods are prohibited by the *Tariff*. At the moment, they are simply not equipped to efficiently do so.

The immediate consequence of this lack of information resources is delay and inconsistency. The ultimate consequence is the inability of Customs to contribute appropriately to the other highly integrated gathering systems being

put in place by law enforcement agencies. If there is to be any really effective overall Customs enforcement in the area of prohibited goods, Customs must immediately acquire dedicated "on-line" information resources. Before Customs can be expected to give needed information to companion agencies such as the RCMP, it must be able to inform itself about its own operations.

#### **Recommendation 28**

**Customs should investigate the practicality of charging appropriate fees for the filing and hearing of appeals from classification decisions.**

As one method of helping to finance the kind of information mechanization that Customs requires, fees could be charged for the filing and processing of appeals. We think the fees should be set at a level that realistically attempts to compensate Customs for the administrative costs it sustains as a result of processing appeals. We do not think that the level of fees should be so unreasonably high as to frustrate the bringing of appeals.

We have no adequate way of knowing the likely cost of collecting such administrative fees. It may be that the costs involved would make our recommendation counter-productive. We simply suggest that Customs investigate the possibility of recovering some of its administrative costs so that more resources could be dedicated to the capital expenditures necessary to better equip the Customs Branch and to perform some of its clerical functions.

#### **Recommendation 29**

**Customs, as part of a combined project to be undertaken with the Department of Communications and the CRTC, should examine the Customs implications involved in trans-border telecommunication of pornographic material.**

None of the members of the Committee has a technical background and we are not equipped to assess the kind of sophisticated technological information that we received from time to time about trans-border telecommunications. We were told that the technology exists to transmit pornographic material by means of telecommunication so that pictorial material could, for example, be transmitted electronically from the United States and be reproduced in Canada. The best analogy we can think of is the telex equipment most people are familiar with.

We do not make this recommendation to promote speculation about state-of-the-art methods to transmit pornographic material, but rather to indicate that this technology appears to be the next generation to the well known telex and telecopier machines many people have in their offices. The transmission of information in the way that has been described could, of course, completely bypass the existing scheme of Customs inspection. One of the challenges Customs faces in the next decade will be to determine how to manage and control material transmitted by technology.

## Footnotes

<sup>1</sup> Section 5 of the *Narcotic Control Act*, 1960-61, c.35, provides:

(1) Except as authorized by this *Act* or the regulations, no person shall import into Canada or export from Canada any narcotic.

(2) Every person who violates subsection (1) is guilty of an indictable offence and is liable to imprisonment for life but not less than seven years.





## Chapter 22

# Canada Post

Earlier, we reviewed the overlapping and, to some extent, competing jurisdictions of the Customs and Postal services. We have no desire to enter the controversy about what international mail Customs can or should inspect. In any event, the controversy would appear to have been resolved. The agreement that Customs may inspect mail weighing more than 30 grams is awaiting legislative confirmation when the proposed new *Customs Act* is reintroduced in Parliament.

Our recommendation is addressed to the level of co-operation that must necessarily exist between the two services and the RCMP if there is to be an effective overall effort to control prohibited goods sent to Canada by mail. As we have recorded earlier, Customs and the RCMP are exchanging information and now supply information to a common data bank. This quite recent development is really just an extension of the other formal arrangements that have been made with respect to a division of responsibility for investigation and enforcement under the Customs legislation. The relationship between the Customs Branch and the RCMP appears to be comprehensively structured and well managed.

The same cannot be said about the involvement of the Postal service. It appears to have adopted a completely passive role. No priority has been assigned to the investigation of the transport of pornographic material in either the domestic or international mail. It appears that the postal service has been content to allow Customs and the RCMP to assume complete investigatory and preventative roles. The best information that we have is that while the postal service is provided with available compiled data by the RCMP and Customs, the flow of information is entirely one way. This apparent disinterest seems to be unique to Canada. While we have no comprehensive knowledge of the subject, it appears that in both the United States and countries in the Commonwealth there is an integrated co-operative effort involving Customs, the Postal service and the appropriate law enforcement agencies.

### Recommendation 30

**The Postal service should assign policy and administrative priority to the effective control of distribution of pornographic material by mail. We further**

recommend that the postal service actively participate with the RCMP and the Customs service in gathering and exchanging information and data in an effort to better co-ordinate effective investigation and enforcement techniques to control the distribution of pornographic material by mail.



## Chapter 23

# Broadcasting and Communications

Our recommendations relate to aspects of the policies and procedures followed by the CRTC and to initiatives which Canada should be taking nationally and internationally.

### Recommendation 31

**The amendments we have proposed to the Criminal Code with respect to proscribed pornographic material should be incorporated by reference into Regulations passed or to be passed by the CRTC pursuant to the Broadcasting Act with respect to all broadcast media.**

We point out that we are referring in this recommendation, only to the pornographic material that is proscribed under tier 1 and tier 2 of our proposed *Criminal Code* amendments and not to the material that is simply limited by display.

This recommendation raises two points, one large and one small. The small point is this: at present, the Regulations for AM and FM Radio Broadcastings, and publicly broadcast television, prohibit the broadcast of “anything contrary to law” and any obscene language or pictorial presentation. Accordingly, the broadcast of any material that violates the *Criminal Code* would constitute a breach of the CRTC’s Regulations and could lead to the Commission imposing sanctions. As we have already pointed out, the same prohibitions do not appear in the Pay Television Regulations. In our view, the prohibition must appear in these Regulations if the Commission is to be able to move against a licence in the event of a breach of the criminal law.

Perhaps the reason for the omission has to do with the fact that pay television is a limited specialized subscriber service. Or, perhaps the reason for the omission has a great deal to do with the confused state of Canada’s obscenity laws. If it is the former, we can see no valid reason to allow the broadcast of any illegal material on any media. If it is the latter, we think our recommendations with respect to what material will be illegal under the *Code* will help to bring the necessary certainty to the law.

In any event, we are of the view that the pay television Regulations should be amended so as to conform with the Regulations that have been passed with respect to free public radio and television broadcasting.

In the result, pay television broadcasters would face precisely the same consequences as all public broadcasters face if they choose to broadcast illegal material.

The larger point that is raised by this recommendation is that if our proposed *Criminal Code* amendments to proscribe pornographic material are incorporated by reference into the existing broadcast Regulations, the utility of the existing Regulations prohibiting obscene or indecent language or pictorial representation will have to be re-examined. Our recommendations covering proscribed pornographic material apply to material that depicts some kind of sexual activity. Material that is violent or disgusting but which has no sexual aspect to it, is not proscribed by our recommendations. If this material is to be prohibited from broadcast, the Regulations to the Broadcasting Act will have to be appropriately redrawn.

#### **Recommendation 32**

**Canada should take the initiative to immediately open discussions on the international regulation of both public broadcasting signals and private signals emanating from fixed satellite services.**

It would be entirely inconsistent for Canada to regulate pornographic and/or abusive programming domestically and do nothing about the regulation of such programs when they are received in Canada, but originate in another country. We can understand the important principle of national sovereignty and we are convinced, therefore, that any such international regulation will be achieved only as a result of agreement between sovereign countries. The most pressing need is for discussions to begin with the United States. Both countries have experience with comprehensive domestic regulation and both countries must surely understand the urgency for joint action to regulate pornographic program content. Both countries are members of INTELSAT, the global satellite system. We hope that Canada and the United States will jointly sponsor discussion of this issue in that international forum.

#### **Recommendation 33**

**The CRTC should conduct the appropriate research into and promote appropriate public discussion about technology capable of scrambling and descrambling satellite signals, in order that there can be a measure of practical control over the transmission and reception of satellite signals.**

We hope that the international regulation we speak of in our Recommendation 32 will not be too long in coming. However, the issue of the reception of satellite signals that contain pornographic material is too urgent to remain untreated pending an international agreement on regulation. In the meantime, we agree with the private views expressed by the Chairman of the CRTC and quoted earlier. We hope the CRTC will help to facilitate necessary further technological research in this area. The Commission's mandate under the *Broadcasting Act* includes the following power:

18.(1) The Executive Committee may undertake, sponsor, promote or assist in research relating to any aspect of broadcasting and in so doing it shall, wherever appropriate, utilize technical, economic and statistical



information and advice from the Corporation or departments or agencies of the Government of Canada.

If it is determined that there is an affordable technological method whereby those who own satellite antennas can prevent the reception of unwanted signals, we are sure the Commission will make that fact well known. We have no doubt, based on the submissions that have been made to us, that a large number of Canadian parents hope that such technology will be available to protect their children from unwanted and intrusive pornographic broadcasting.

#### **Recommendation 34**

**Upon the issuing or renewal of a broadcast licence, a licensee should be required to post a bond in an appropriate amount to ensure compliance with the Regulations and conditions of licence relating to program content. In the event that a complaint about program content is upheld by the CRTC, the Commission should have the discretion to compensate the complainant for the costs incurred in presenting the complaint, such costs to be paid the licensee and secured by the aforesaid bond.**

As we have mentioned, the CRTC cannot and does not monitor all programs either by way of pre-clearance or by way of on-air observation. Concerned members of the public may, therefore, decide that it is in the public interest to have programs monitored. Such an effort may well be required to properly document a complaint to the Commission, particularly if the complaint relates to some systematic behaviour by a licensee.

In our view, a successful complainant should be compensated (not rewarded, but compensated) for the reasonable costs involved in accumulating and presenting the necessary evidence. In addition we think that the reasonable hearing costs of the successful complainant should be paid.

We do not think that these costs should be paid by the public.

We think that the licensee against whom the complaint has succeeded should be obliged to pay the costs of the complaint.

In order to make the proposal work, the Commission must be given the jurisdiction it now lacks, both to award costs and determine their amount. Such jurisdiction can only arise upon amendments being made to the appropriate legislation.

As security for the payment of costs, all licensees could be required by the CRTC to post a bond or equivalent security or other financial instrument at the time a licence is issued or renewed. The posting of such an instrument would prevent the penalty that would clearly arise if a licensee was required to post a cash amount.

In any civil litigation the successful party is entitled to some compensation for costs. In quasi-judicial situations a system of compensation for costs is also well-known. Although the analogy is not perfect, human rights commissions in



Canada have the power to award costs. The various commissions actually provide the facilities and the staff for a complainant to pursue a remedy. If the complainant makes use of these facilities, costs will not be awarded to a successful complainant. If, however, the complainant obtains private counsel, costs may be awarded in the discretion of the tribunal. If the commission is of the view that the complaint was frivolous, it can award costs to a respondent.

In the case of complaints to the CRTC, it might well be argued that the Commission should have the jurisdiction to award costs to a licensee who has been successful in defending a complaint. However, it must be remembered that the Commission has the discretion to decide whether a complaint will proceed and whether there should even be a hearing. In these circumstances, we think that it is sufficient to give the Commission the power and the discretion to award costs only to the complainant.

## Chapter 24

# Human Rights Approach

### 1. Introduction

There was considerable interest expressed at the Committee's hearings in treating pornography as a human rights issue. Proponents of this approach did not, for the most part, make detailed proposals about how this might be accomplished in the Canadian context. Their submissions, however, stressed a number of interrelated themes.

The first such theme emerges from the endorsement of the concept of pornography as defined by Helen Longino, Andrea Dworkin and others. Pornography is seen as involving, and may indeed inspire, the hatred of women. It is a powerful part of society's repression of women. As such, it is seen as an evil which limits the full human rights and dignity of women and, correspondingly, as an evil most appropriately attacked by means of the legislation already existing in our society to further human rights and dignity. Hence the call to use human rights legislation, and the enforcement mechanisms of human rights commissions, to attack pornography.

Proponents of the human rights approach cite as the best example of use of this method the by-law drafted by Andrea Dworkin and Catharine MacKinnon. Proposed for the City of Minneapolis and later enacted in Indianapolis, this by-law has a number of features which bear examination.

The by-law explicitly states that pornography is a form of discrimination on the basis of sex. The rationale for this characterization is spelled out in the by-law: pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women; the bigotry and contempt it promotes, with the acts of aggression it fosters, harm women's opportunities for equality of rights in employment and almost all other areas.<sup>1</sup> The framers of the by-law, Andrea Dworkin and Catharine MacKinnon, maintain in fact that the influence of pornography over the ages on the men who rule societies has contributed to the development of misogynist (women-hating) social

institutions. Only now, however, that changes in technology and the market have made pornography widespread have we begun to understand its impact.<sup>2</sup>

The Indianapolis by-law articulates one of the city's objectives as "to prevent and prohibit all discriminatory practices of sexual subordination or inequality through pornography".<sup>3</sup> The by-law is specifically directed at three distinct activities: trafficking in pornography, coercion into pornographic performances, and forcing pornography on a person.

With regard to trafficking, the by-law provides that the production, sale, exhibit or distribution of pornography is discrimination against women by means of trafficking in pornography, and gives to any woman a cause of action under the by-law "as a woman acting against the subordination of women." Any man or transsexual who alleges injury by pornography in the way women are injured by it is also given a cause of action.<sup>4</sup> The formation of private clubs or associations for purposes of trafficking in pornography is illegal.<sup>5</sup> This cause of action is the most far-reaching in the by-law. The position is that the public availability of the pornography, as defined in the ordinance, is in and of itself a violation of women's rights to equal personhood and citizenship. It would seem that a remedy would be available on the mere showing that the pornography is within the definition in the by-law, without a further showing of damage personal to the complainant.

Any person who is coerced, intimidated or fraudulently induced into performing in pornography is given a cause of action against the maker, seller, exhibitor, or distributor of the pornography for damages, and for the elimination of the products of the performance from public view.<sup>6</sup>

Any person, who has pornography forced on him or her in any place of employment, in education, in a home or in any public place has a cause of action against the perpetrator or institution.<sup>7</sup>

In addition to these three provisions, the by-law confers on any person who is assaulted, physically attacked or injured in a way that is directly caused by specific pornography a cause of action for damages against the perpetrator, maker, distributor, seller, and exhibitor, and for an injunction against further exhibition, distribution or sale of the specific pornography.<sup>8</sup>

The by-law contemplates that the person may assert these causes of action in either of two forums. The municipal Office of Equal Opportunity is empowered to receive a complaint. Once the complaint has been filed, the by-law provides for an investigation, and for an informal conference in an effort to eliminate such practice if there is reasonable ground to believe that a breach has occurred. If the complaint is not resolved informally, the Complaint Adjudication Committee may hold a public hearing. The board may seek judicial enforcement of its decision if a respondent fails to comply with it. Recourse to the courts also arises in another way. The complainant may seek temporary equitable relief through the courts upon the filing of a complaint.



## 2. The Canadian Context

It is worthy of note that some of those who supported the idea of a civil remedy for pornography appeared to do so as much for procedural reasons as for the substantive ones on which the Indianapolis by-law is based. The Committee received complaints that police or Crown Attorneys were refusing, for various reasons, to bring charges in connection with material considered obscene by citizens. The Crown's decisions not to prosecute are difficult to circumvent. They cannot be reviewed by a court, and may for practical purposes be difficult to reverse by means of political pressure.

There are difficulties in bringing private prosecutions. They may be stayed by the Crown with no opportunity for the person bringing the prosecution to have the Crown's decision to enter a stay legally reviewed. Other cases may require investigative and financial resources beyond the reach of many. The burden on the private prosecutor is the same as the burden imposed upon the Crown, proof of guilt beyond a reasonable doubt.

In a civil action, proceedings are not dependent on the Crown's volition: the parties themselves have control of the matter. The standard of proof is not nearly so high. Instead of proof being established beyond a reasonable doubt, the case need be proven only on a balance of probabilities. It must be acknowledged, however, that those who proceed with civil actions face the need to pay legal bills, not only for their own counsel, but also for the opposing party should the action be unsuccessful. However, it is thought that involvement of human rights commissions where complainants are not required to pay legal costs, may alleviate that particular disadvantage.

Evaluating the usefulness of the civil action approach in the Canadian context thus requires a consideration not only of the important substantive issue raised by its proponents, but also of the features which make it attractive from a procedural point of view.

Before assessing the civil action option from both of these points of view, we review briefly the availability in Canadian law of recourse like that set out in the Indianapolis by-law.

### 2.1 Canadian Law

In Canadian law, recourse for some of the harms attacked in the Indianapolis by-law may be available, but with two important differences from the by-law. Firstly, the recourse may be somewhat indirect, compared with the straightforward spelling out of remedies in the by-law. Secondly, problems of proof of harm will in many cases be more difficult in Canadian law than is contemplated in the by-law. Some examples are outlined here.

Take, for instance, the relief conferred by the by-law for someone coerced, intimidated or fraudulently induced into performing in pornography. In

Canadian law, it may well be possible for someone in this position to sue for damages for fraudulent misrepresentation, or for defamation. In an appropriate case, the court may be prepared to grant an injunction to stop the publication or distribution of the material complained of. Depending on the circumstances, criminal charges may be brought against the person wrongfully bringing about the participation in pornography.

The Indianapolis by-law, however, contains a number of stipulations withdrawing certain defences to an action for wrongfully involving a person in the production of pornography. Among the possible defences withdrawn are: that the person actually consented to a use of the performance that is changed into pornography; that the person knew that the purpose of the acts or events in question was to make pornography; that the person demonstrated no resistance or appeared to co-operate actively in the photographic sessions or in the sexual events that produced the pornography; and that the person signed a contract, or made statements affirming a willingness to co-operate in the production of pornography.<sup>9</sup> Doubtless it is the withdrawal of these potential defences which makes this aspect of the by-law attractive to its proponents, for each of these defences is open to abuse by an unscrupulous person who is truly manipulating another into appearing in pornography.

The Indianapolis by-law confers on any person who is assaulted, physically attacked or injured in a way that is directly caused by specific pornography, a cause of action for damages against its perpetrator, maker, distributor, seller and exhibitor. It is not unlikely that, even without such a by-law, this type of action might succeed if brought in Canada. The person suffering such damage could bring a civil action. Depending on the facts of the case, the victim could allege either that the infliction of harm was intentional, or that it resulted from negligence on the part of the party being sued. The potential of bringing this type of action was raised during the public hearings. It was pointed out that negligence concepts are now being extended to situations where, for example, a tavern keeper who knew a customer was too drunk for safety but allowed him to depart the premises was held responsible for damages arising when the customer was hit by a car on the side of the road.<sup>10</sup>

The difficulties involved in pursuing an action for damages for harm caused by pornography would be primarily ones of causation and proof. It would have to be established that the injury was caused by the pornography. We have been told during our hearings of two kinds of cases where this might be possible. Workers from shelters for battered women report being told by some clients that their male friends or spouses required them to participate in acts of violence imitating images seen by the men in pornographic magazines. Some cases of violent crimes against women where the perpetrator was found to have a supply of violent pornography were drawn to our attention. In either type of case, assuming that the facts could be proved, it may be possible to bring this type of action.

Of course, a typical defence might allege that a different cause altogether was responsible for the actions; in the case of a psychopathic-type murder, for



example, an accused who had manufactured pornography would likely advance the murderer's mental condition as the direct cause of the crime. The negligence action might face another hurdle, that of establishing that in law, the victim or potential victim of pornography should have been in the contemplation of the defendant. Establishing such a proposition might well involve canvassing in court the substantial experimental literature on the links between pornography and violence discussed in Section I, chapter 6 of this Part.<sup>11</sup>

All in all, however, it can be said that there is little in the Indianapolis by-law itself which would eliminate problems like the foregoing in an action brought pursuant to the by-law. To that extent, it may be said that the position in Canadian law is comparable to that explicitly provided for on this point by the by-law.

A provision of the by-law which has caused great interest in Canada is the action for damages and injunctive relief which may be brought by any woman complaining of trafficking in pornography. The proceeding does not require a showing of actual harm. Upon proof that the material is within the definition of pornography, it is taken that the harm is made out. Thus, it can be said that the by-law confers a private cause of action to restrain or redress a public wrong. The possibility of using human rights procedures in this fashion has prompted considerable interest in Canada.

It should be pointed out at this point that using the private action to redress a public wrong has not, until now, been a prominent feature of Canadian law. It is the Attorney General who must ordinarily sue to redress a public wrong. An individual who seeks to act in this fashion must secure the Attorney General's permission so to proceed, and the Attorney General's decision to grant or withhold such permission will not be reviewed by the courts.<sup>12</sup> Only if the individual has suffered some personal harm above that which has been sustained by members of the public generally can he or she proceed with a private action without official permission.

In fact, it is rare that even the Attorney General will proceed against a public wrong by way of a court action. Ordinarily, the recourse for public wrongs is by way of the criminal law, or a proceeding under the appropriate regulatory statute.

We think that a lot of the interest in the Indianapolis by-law approach really derives from Canadians' dissatisfaction with the administration of the criminal law relating to pornography. The ability of any private citizen to set in motion the legal process was frequently mentioned as an attractive feature of the by-law approach. To the extent that deficiencies in the criminal law, be it administration or substance, have prompted the recommendation to emulate the Indianapolis approach, we prefer to address directly the deficiencies in the criminal law rather than create a new form of civil action to redress a public wrong.



It must be said, however, that not all of the interest in the by-law approach originates with complaints about an unresponsive criminal justice system. As a matter of substance and principle, many proponents of the by-law approach find attractive the argument that pornography is a form of discrimination against women. The degradation of pornography is seen as the kind of affront to human dignity which is properly the subject matter of a human rights complaint. On principle, then, it is argued that the appropriate authority to deal with pornography is that having jurisdiction over human rights. Incidentally, it is noted that human rights enforcement procedures contain the attractive feature of being relatively open to all and inexpensive for the individual.

It is worthwhile to note at this juncture that human rights authorities in Canada are already, to a certain extent, dealing with pornography-related complaints, in ways similar to those contemplated by the Indianapolis by-law.

The by-law, for example, provides that any person who has pornography forced on him or her in any place of employment, in education, in a home or in any public place has a cause of action in court, or before the human rights authorities, against the perpetrator or institution. The complaints of unwilling exposure to pornography in employment, education or a public place may find redress under existing Canadian human rights codes, as we discuss in Section II, Chapter 13.

The decision of the Board of Inquiry in the *Red Eye* case, which we discuss in Chapter 13, and the Saskatchewan legislation under which it was made, are significant for a number of reasons. As the Board itself points out, there is no need under the *Human Rights Code* provision to apply the "community standards" test of obscenity.<sup>13</sup> Nor is there any necessity to demonstrate that the person alleged to have violated the section had an intent to belittle or offend. In these two important respects, the burden facing a complainant is less under the human rights provision than it would be under the *Criminal Code*. The decision itself is significant because of its clear recognition that material like that at issue in the case should be seen as violating the equality rights of women guaranteed by *Charter of Rights*. It is an important step in the development of women's legal and constitutional position to have the equality guarantees recognized as being of equivalent constitutional force to the long recognized freedom of expression guarantee.

An appeal of the *Red Eye* decision has been launched. Whatever may be its outcome, a very useful way of approaching the issue of pornography has now been put on the public agenda. There may be some cause to expect that the constitutional validity of the Saskatchewan provision may be upheld by the Court. Mr. Justice Quigley of the Alberta Court of Queen's Bench ruled in *R. v. Keegstra* that in assessing the validity of s. 281.2 of the *Criminal Code* (dealing with so-called hate propaganda), the Court should consider not only the guarantee of freedom of expression in paragraph 2(b) of the *Charter* but also the guarantee of equality conferred by section 15 and the protection of multicultural rights conferred by section 27.<sup>14</sup> This is the same basic approach

as that taken by the Board of Inquiry. Should this approach be followed by the Saskatchewan Court, the Board's decision may well be upheld.

In light of the position taken by the Court in *Keegstra*, there is some reason, indeed, to hope that a human rights statute like the Saskatchewan one will not suffer, in Canadian constitutional law, the same fate as did the Indianapolis by-law in the United States District Court. In a decision rendered in November, 1984, Judge Sarah Evans Barker declared the Indianapolis by-law to be invalid.<sup>15</sup> Among the major reasons for the decision was the position in American constitutional law that only "obscene" speech falls outside the protection for freedom of expression conferred by the First Amendment. Where laws impinge on speech that is not obscene, the state must show that they serve a compelling state interest, which is equivalent to the interest served by the First Amendment. Otherwise, the law will be unconstitutional.

Judge Barker held that the type of images prohibited in the Indianapolis by-law went beyond the legal definition of obscenity, a concept that is founded on the ideas of sexual prurience. In justification of the incursions into the area of so-called "protected speech", the city argued that the by-law served the compelling interest of protecting women from discrimination. This argument was rejected, largely on the basis of the moderate level of protection which has traditionally been afforded in American constitutional law against gender-based distinctions in law.

In Canadian constitutional law, we suggest, the *Charter of Rights* makes it clear in sections 15 and 28 that equality of women is a strongly protected value. Mr. Justice Quigley's analysis on this point, focusing on section 15 as a counterbalance to section 2, is, in our view, to be preferred in the Canadian context to the reasoning of Judge Barker.

This Committee was urged to recommend that provisions along the lines of the Saskatchewan hate literature provision be included in other Canadian human rights codes. We have considered the recommendation carefully, because we find attractive the rationale underlying the Saskatchewan decision. Pornography is, to our minds, an offence against human dignity and the guarantee of equality.

We have reservations, however, about the appropriateness of including a remedy aimed specifically at pornography solely within the jurisdiction of human rights commissions. These reservations stem in large part from our concerns about the nature of the commissions' process.

Typically, the receipt of a complaint initiates a process of investigation by a Commission. Most human rights commissions have a statutory obligation to attempt conciliation of a complaint before proceeding to the stage of a formal hearing. Until the complaint reaches a formal hearing stage, it can be expected that there will be little or no publicity from the commission about the issues or the progress of the case, since the investigation and conciliation phases are



characterized by obligations of confidentiality. Often, the investigation and conciliation phase will be long. The *Red Eye* complaint, for example, was initiated in July of 1980. It was not until September, 1981 that the Board of Inquiry which would hear the complaint was named. The Board's decision emerged in March, 1984. The offending issues of the *Red Eye* had been published in 1979 and 1981. If the commission takes the view that the complaint should not lead to a public hearing, the complainant has limited recourse.

These disadvantages in the human rights procedure may well be balanced against its perceived advantages to the complainant, namely, that the commission bears the cost of the proceedings, and that anyone by making a complaint can oblige the commission to take some sort of action. One must also bear in mind, however, the negative aspects of even these perceived procedural advantages. Human rights commissions often experience difficulty in receiving enough funding to meet the demands placed upon them. In our view, one must consider carefully the financial implications of adding to commission jurisdiction a ground of complaint that may produce substantial numbers of new cases. Not only the ability to service the new caseload, but also the possible jeopardy to the commission's ability to meet existing demands upon it should be considered.

Given the interest in this issue and this remedy shown in our public hearings, the volume of material which is felt to be offensive, the relative ease of launching a complaint and the dissatisfaction with the responsiveness of existing enforcement authorities, we predict that there may be frequent resort to the human rights jurisdiction. The influx of new cases could have quite serious implications for commission funding. Unfortunately, the current climate of fiscal restraint in government circles has affected human rights commissions and other social agencies. One has little cause to hope that even a wave of anti-pornography popularity could provide enough new revenue to allow both the new and existing caseload to be serviced.

A further difficulty with the commission process has a serious bearing on the suitability of a commission to handle pornography complaints. Human rights commissions cannot give interim relief. They could not, for example, prevent the distribution of a particular publication pending resolution of a complaint, or take other similar steps to meet a crisis in the short-term period while a complaint was being processed. Much pornography about which persons will likely complain is contained in magazines with monthly issues. Thus an offending issue could be widely distributed, to the considerable enrichment of its publisher and wholesaler, long before a resolution of the complaint had been effected. By the time the remedy had been decided upon, the consumers of the original material could well have forgotten it, so that any retraction or apology would be almost totally meaningless. The court's process, on the other hand, offers the possibility that effective pre-trial measures would be available in a proper case, to take the material out of circulation immediately.



Given these concerns, we refrain from urging that provisions like subsection 14(1) of the Saskatchewan *Code* be inserted into all human rights legislation. We do, however, believe that it would be most beneficial for human rights commissions to explore vigorously the application of their existing legislation and jurisprudence to pornography issues. The application of the existing employment jurisprudence to control the presence of pornography in the workplace has already been mentioned. So, too, has the need to develop the same kind of approach in the area of services and facilities. In our view, it is important that commissions become active in putting issues concerning pornography on their existing agendas, but we are not confident that they will be able to handle a large number of complaints basically unrelated to their traditional areas of endeavour. The requirement of handling complaints arising from the large numbers of periodicals with pornographic content, or which people think have pornographic content, would, in our view, seriously overbalance commissions without producing much useful or timely resolution of issues.

### Recommendation 35

**Human rights commissions should vigorously explore the application of their existing legislation and jurisprudence on pornography issues, including exposure to pornography in the workplace, stores and other facilities. However, we do not recommend that a separate pornography-related offence be added to human rights codes at this time.**

We believe that a good alternative to the use of human rights commissions as adjudicators of pornography issues can be brought into existence reasonably expeditiously. We recommend that jurisdictions enact by legislation a civil cause of action focusing on the violation of civil rights inherent in pornography. There now exists in Canadian law at least a partial model for such a cause of action. The *Civil Rights Protection Act, 1981*,<sup>16</sup> of British Columbia, creates a class of “prohibited acts”. In subsection 1(1) of the *Act*, “prohibited act” is defined as “any conduct or communication by a person that has as its purpose interference with the civil rights of a person or class of persons by promoting:

- (a) hatred or contempt of a person or class of persons, or
  - (b) the superiority or inferiority of a person or class of persons in comparison with another or others,
- on the basis of colour, race, ethnic origin or place of origin.”

The *Act* provides in subsection 1(2) that a prohibited act is a civil wrong (tort) that can be the subject of a claim by a person or class of persons, without the necessity of the complainant proving that any actual damage was suffered. Section 3 of the *Act* allows the Court to award damages and an injunction in appropriate cases.

It may actually be possible to use this act now as the basis for an action against pornography featuring demeaning racial stereotypes. Examples of such material were presented to the Committee during the public hearings; it is certainly within the bounds of possibility that it could be held to promote

hatred or contempt of a person or class of persons or the inferiority of that person or persons in comparison with another or others.

#### Recommendation 36

**Legislation along the lines of the Civil Rights Protection Act, 1981 of British Columbia should be enacted in all Canadian provinces and territories to provide a civil cause of action in the courts in respect of the promotion of hatred by way of pornography, and the existing British Columbia Act itself should be extended to cover the promotion of hatred by way of pornography.**

We are not going to offer here an elaborate draft statute, because we are aware that there may be many ways of effecting this basic purpose. One simple way would be to add "sex" or "gender" to the definition of "prohibited act" in subsection 1(1) of the *Act*. Another proposal that has been made is to add to the *Act*, a definition of pornography which is very close to that found in the Indianapolis by-law,<sup>17</sup> but it may be that others favour a less particular statute.

However the drafting may be done, we are convinced that to enact this sort of legislation would confer a cause of action which has many of the attractive features of the human rights approach. It is an action which does not need the approval of the Crown or Attorney General, and will be controlled by the party suing rather than a human rights commission. It will be conducted in a public forum. It will probably take no longer to prosecute than a human rights complaint, and could take less time. The cause of action reaches the nub of what is offensive about pornography, and the remedies seem flexible. This type of action does not foreclose the prospect of bringing an action for intentional harm or negligence against the purveyor of pornography when a link between pornography and actual harm can be established.

It seems that the most unattractive feature of the *Civil Rights Protection Act* approach is that the costs of the action must be borne by the party and not by the state, as would be the case with a criminal prosecution or a human rights complaint. Individuals confronting a pornography distributor with substantial resources might well be deterred by such a prospect, particularly when it is remembered that a successful defendant might recover a large part of its legal costs from an unsuccessful plaintiff.

In our view, however, this cost consideration should not overbear the recommendation to institute this type of action. The "class action" feature gives some useful possibility of spreading the costs among numbers of persons with similar interests. The availability of injunctive relief means that the object of the lawsuit — restriction of the circulation of a particular periodical, for example — may be achieved without protracted proceedings. Alternatively, the prospect of such relief being obtained might encourage settlements. Negotiations for such settlements would be under the control of the plaintiffs, rather than the human rights commission, and the results of such settlements could be made public so as to serve as a deterrent for other pornographers. Although, then, there are some cost disadvantages in the private action method, we think that on balance this is a desirable option.

We note that the Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society proposed in its 1984 report *Equality Now!* that civil actions against discriminators be permitted as an alternative to human rights proceedings.<sup>18</sup> In our view, even if the legislatures should decide that human rights commissions should have an explicit 'pornography' jurisdiction like that in subsection 14(1) of the *Saskatchewan Human Rights Code*, the civil action described above should be available as an alternative. That will ensure that persons or groups with the resources and the inclination to pursue it will have a real choice of forum.

#### **Recommendation 37**

**Even if legislatures decide to include in human rights codes a specific pornography-related provision, we recommend that the civil cause of action described in Recommendation 36 be provided as an alternative.**



## Footnotes

- <sup>1</sup> An ordinance of the City of Minneapolis Amending Title 7, Chapter 139 of the Minneapolis Code of Ordinances relating to Civil Rights, Section 1 (amending Section 139.10 of the ordinance).
- <sup>2</sup> Memorandum to Minneapolis City Council from Catharine A. MacKinnon and Andrea Dworkin Re Proposed Ordinance on Pornography, December 26, 1983.
- <sup>3</sup> City — County General Ordinance No. 24, 1984, Section 1, which amends section 16 of the Code of Indianapolis and Marion County. See, in particular, the new s. 16-1(8). (Hereinafter referred to as Indianapolis By-law.)
- <sup>4</sup> Indianapolis By-Law, section 1; see the new s. 16(4)(C).
- <sup>5</sup> Indianapolis By-Law, section 1; see the new s. 16(4)(B).
- <sup>6</sup> Indianapolis By-Law, section 1; see the new s. 16(5).
- <sup>7</sup> Indianapolis By-Law, section 1; see the new s. 16(6).
- <sup>8</sup> Indianapolis By-Law, section 1; see the new s. 16(7).
- <sup>9</sup> Indianapolis By-Law, section 1; see the new s. 16(5)(A).
- <sup>10</sup> *Jordan House v. Menow and Honsberger* (1973), 38 D.L.R. (3d) 105 (S.C.C.).
- <sup>11</sup> Several actions have been brought in the United States by persons seeking to hold a broadcaster responsible in damages for harmful results of actions allegedly inspired by the broadcast. In *Weirum v. RKO General, Inc.* 15 Cal.3d 40 (1975), the California Supreme Court upheld a jury finding that a Los Angeles rock radio station was liable for the wrongful death of a motorist killed by two teenagers participating in a contest sponsored by the station. In *Olivia N. v. National Broadcasting Co.*, 126 Cal.App.3d 488 (1981) the California Court of Appeals upheld dismissal of a suit on behalf of a young girl who had been raped with a plunger by a group of youngsters emulating a scene shown in a television program. The parents of a 13 year old who accidentally hanged himself while trying a stunt he had seen on the Johnny Carson show failed to recover damages in *DeFilippo et al v. National Broadcasting Co., Inc. et al.*, 446 A.2d 1036 (1982, Supreme Court of Rhode Island). In all of these cases, the powerful First Amendment protection of freedom of expression caused the court to apply the standard of whether the material had "incited" the conduct, rather than whether the broadcaster had been reckless or negligent.
- <sup>12</sup> *Gouriet v. A.-G.*, [1978] A.C. 435 (H. L.).
- <sup>13</sup> *Saskatchewan Human Rights Commission v. The Engineering Student's Society, University of Saskatchewan et al.* 7 Mar. 1984 unreported (*Red Eye Decision*) at 42.
- <sup>14</sup> *R. v. Keegstra* 5 Nov. 1984 (Red Deer) unreported (pretrial hearing) at 20-23.
- <sup>15</sup> *American Booksellers Association Inc., et al. v. Hudnut et al.*, No. IP 84-791C (Dist. Indiana Nov. 19, 1984). Judgment of Judge Sarah Evans Barker.
- <sup>16</sup> S.B.C. 1981, c.12.
- <sup>17</sup> Proposed by the Women's Committee of the Faculty of Law, University of British Columbia.
- <sup>18</sup> Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society, *Equality Now!* (1984, Supply and Services Canada, Ottawa) at 77.

## Chapter 25

# Hate Literature

We have discussed in the previous chapter the proposals we received that a remedy against pornography be provided by way of human rights legislation, as is now the case in the province of Saskatchewan. The basis of this thinking is the belief that pornography inhibits the equality of women, and their access to opportunities in economic and political spheres, by inculcating in society the idea of women's subordination. Inherent in the idea of pornography as a human rights issue is the idea that pornography causes, or at least reflects, a societal tendency to hate women. The belief that pornography and the misogyny of society are closely inter-related has given rise to the argument that pornography is hate literature against women. Some are sure that this form of hate literature can best be dealt with by means of human rights commissions. Others advocate stronger measures, namely the amendment of the hate message provisions of the *Criminal Code* so as to include protection for groups characterized by sex or gender.

The provision at the focus of these submissions is section 281.2 of the *Criminal Code*:

(1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, is guilty of

- (a) an indictable offence and is liable to imprisonment for two years; or
- (b) an offence punishable on summary conviction.

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

- (a) an indictable offence and is liable to imprisonment for two years; or
- (b) an offence punishable on summary conviction.

Subsection (2) of this provision has been most particularly considered applicable to pornography. In section 281.2, and the related section 281.1 dealing with the advocacy or promotion of genocide, "identifiable group" is defined as "any section of the public distinguished by colour, race, religion or ethnic origin".<sup>1</sup> Those who say that this section should be amended to deal with pornography propose that "sex" be added to this list.

Section 281.2 was the subject of comment by the Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society in its 1984 report, *Equality Now!*. The Committee recommended that subsection 281.2(2) be amended so that it is no longer necessary to show that an accused specifically intended to promote hatred.<sup>2</sup> This recommendation was accepted by then Justice Minister MacGuigan in June, 1984. He announced that the word 'wilfully' would be removed from subsection 281.2(2).<sup>3</sup> Most of the groups who addressed this issue in our hearings also favoured the removal of this requirement for specific intent.

Another recommendation of the Special Parliamentary Committee dealt with the defences available to a charge under subsection 281.2(2). At present, section 281.2(3) of the *Code* provides:

- (3) No person shall be convicted of an offence under subsection (2)
  - (a) if he establishes that the statements communicated were true;
  - (b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;
  - (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
  - (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

The Special Parliamentary Committee pointed out that it is now not clear whether the burden of raising these defences is on the accused at all times, or whether the Crown must discharge the burden of disproving a defence. Accordingly, it recommended that the *Code* be amended to make it clear that the burden of raising special defences is on the accused. The Committee rejected proposals that the defences set out in paragraphs (b), (c) and (d) of subsection 281.2(3) be removed.<sup>4</sup> Justice Minister MacGuigan also agreed with the Parliamentary Committee's recommendations on the burden of proving a defence. In June of 1984, he announced that it would be made clear that this burden is on the accused.<sup>5</sup>

The Special Parliamentary Committee also recommended the deletion of the requirement that the Attorney General consent to a prosecution under subsection 281.2(2).<sup>6</sup> The rationale for doing so was a desire to permit private prosecutions of hate literature. The Committee perceived that the section had not given rise to the volume of complaints that had promoted the requirement for the Attorney General's consent.<sup>7</sup> Justice Minister MacGuigan announced in June, 1984 his intention to also accept this recommendation.<sup>8</sup>

We did not receive much comment on the issue of defences to this charge. However, the suggestions for removing the requirement of consent is consistent with recommendations made to this Committee.

We have given serious consideration to the proposals for using subsection 281.2(2) where pornography is concerned. There are, in our view, a number of arguments in favour of taking this course.



If one accepts the argument that pornography is an expression of misogyny, then use of the hate propaganda section of the *Code* in this connection is particularly attractive. If the evil seen in pornography is the communication of an untrue message which expresses or propagates hatred against women, it seems logical that this *Code* provision, and not one dealing with sexual morality, should be aimed against it. Indeed, precisely this point was made by the Board of Inquiry considering the application of the Saskatchewan *Human Rights Code* to the Engineering Students' Society publication *Red Eye*. The Board observed that in the existing criminal law, it seems to be circuitous that women have to use the provisions about obscenity to enforce protection from some of the widespread manifestations of hatred focused upon them.<sup>9</sup> The Board considered that the evil of pornography was very similar to the evil aimed at by section 281.2 as it now stands.

We have, of course, recommended an overhaul of the sections which now appear in the *Code* under the heading "Offences Tending to Corrupt Morals", including the replacement of obscenity prohibitions by a comprehensive set of prohibitions. If our recommendations are implemented, then the contrast between the intent of pornography and the terminology and philosophy of the criminal law will not be as great as it is now.

However, the contrast between the hate implicit in pornography and the sexual morality overtones of "obscenity" is not the only reason for proposing to broaden subsection 281.2(2).

Section 281.2 was enacted following the report of the Minister of Justice's Special Committee on Hate Propaganda, 1965-1966. The Chairman of that Committee, Professor Maxwell Cohen, has identified the following passage from the Report's Preface as expressive of the Committee's rationale for proposing the hate propaganda amendments to the *Criminal Code*:

This Report is a study in the power of words to maim, and what it is that a civilized society can do about it. Not every abuse of human communication can or should be controlled by law or custom. But every society from time to time draws lines at the point where the intolerable and the impermissible coincide. In a free society such as our own, where the privilege of speech can induce ideas that may change the very order itself, there is a bias weighted heavily in favour of the maximum of rhetoric whatever the cost and consequences. But that bias stops this side of injury to the community itself and to individual members or identifiable groups innocently caught in verbal cross-fire that goes beyond legitimate debate.

An effort is made here to re-examine, therefore, the parameters of permissible argument in a world more easily persuaded than before because the means of transmission are so persuasive. But ours is also a world aware of the perils of falsehood disguised as fact and of conspirators eroding the community's integrity through pretending that conspiracies from elsewhere now justify verbal assaults - the non-facts and the non-truths of prejudice and slander. Hate is as old as man and doubtless as durable. This Report explores what it is that a community can do to lessen some of man's intolerance and to proscribe its gross exploitation.<sup>10</sup>

The nub of the test, then, is whether the message that is sought to be made criminal does “injury to the community itself and to individual members or identifiable groups”.

The argument that pornography does indeed do such injury has a number of features. We described in this Report the present state of experimental literature exploring the relationship between pornography and acts or states of mind on the part of its consumers that could be regarded as harmful to women. We have concluded that the research has not proceeded past the inconclusive stage. However, there is another sort of harm altogether which we think should be taken into account when considering the impact of some types of pornography for purposes of the hate literature provision. Section 15 of the *Canadian Charter of Rights and Freedoms* guarantees equality before and under the law and the equal protection and benefit of the law, without discrimination on the basis of sex. This guarantee is reinforced by the provision in section 28 that the rights referred to in the *Charter* are guaranteed equally to males and females. It is argued that one of the group of community values which is harmed by pornography is the constitutionally entrenched equality of women, in that the message of pornography is that women are inferior and subordinate.

This argument received support in the decision of Mr. Justice Quigley of the Alberta Court of Queen’s Bench, in *R. v. Keegstra*.<sup>11</sup> It had been argued that section 281.2(2) of the *Code*, under which James Keegstra had been charged, was contrary to the *Charter’s* guarantee in paragraph 2(b) of freedom of expression, and could not be characterized as a reasonable limit demonstrably justifiable in a free and democratic society, so as to prove constitutionally permissible. Mr. Justice Quigley took the position that it was appropriate to consider all of the *Charter’s* guarantees when determining whether an alleged curb on one of them was justifiable. Against the freedom of expression guarantee he balanced the equality rights conferred by section 15 of the *Charter*, and the proviso in section 27 that in interpreting the *Charter*, Canada’s multicultural heritage must be borne in mind. The need to protect these interests would justify the incursion by section 281.2 into freedom of expression.<sup>12</sup>

It seems to us that this balancing of interests is a desirable one. The guarantee of freedom of expression must, in our view, be tempered by the sometimes countervailing demands of the equality guarantee.

This position seems to us to be reinforced by a further consideration emanating from section 15 of the *Charter*. Subsection 15(1) guarantees the equal benefit of the law without discrimination on the basis of sex and a number of other grounds. Section 281.1(4) of the *Code* provides that “identifiable group” for purposes of the provision means a group distinguished by “colour, race, religion or ethnic origin.” It is apparent that the “benefit” of section 281.2 is not available to members of groups identified by some other of the enumerated categories in subsection 15(1) of the *Charter*, like sex, age, and disability. It could be maintained, on that basis, that section 281.2 does not go far enough in the protection it provides and, for that reason, is vulnerable to



constitutional challenge. Perhaps a simple failure to include a particular group mentioned in subsection 15(1) might not, in and of itself, render section 281.2 unconstitutional. However, it would be more likely to be found unconstitutional where the excluded group is also the target of the kinds of messages forbidden by the section. The arguments and evidence before this Committee give, in our view, ample evidence that women are the targets of messages promoting hatred against an identifiable group.

It seems to us, then, that if provisions like section 281.2 are to be included in the *Criminal Code*, there are strong arguments on equality principles, stemming from the nature of pornography, in favour of extending the protection of the law to women as an identifiable group.

Having said that, however, we must examine still further questions relating to this equality rationale. The first is whether its logic requires a further extension of the hate provision to cover groups distinguished by all the other enumerated characteristics in subsection 15(1) of the *Charter* which do not now appear in section 281.2. If so, what are the implications of such an extension? We note that the hate message sections of the Canadian, Manitoba and Saskatchewan Human Rights Acts all extend the protection to each protected group covered by the legislation.

By the same token, we observe with interest recent amendments to the regulations under the *Broadcasting Act*. It is now forbidden for an AM or FM licensee to broadcast “any abusive comment which, when taken in context, tends or is likely to expose an individual or group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”.<sup>13</sup> These grounds are the ones specifically enumerated in the equality rights section of the *Canadian Charter of Rights and Freedoms*. The new regulations for television and for pay television broadcasting are similar, extending not only to comment but also “abusive pictorial representation”.<sup>14</sup>

The case of pornography involving children provides a useful point of departure to examine these questions. It is certainly the case that not all the children portrayed in the material deplored by presenters of briefs are female children. Accordingly, even a section including as an identifiable group “persons characterized by sex” would fail to protect all those who, on the basis of the argument set out above, would be in need of protection. It would seem, taking this ground alone, that some further bases would have to be added to make the benefit of the section really equal. On the other hand, however, it was not argued before us that pornography involving children was hate literature, in the same way that this point was made concerning pornography involving women. The complaints about child pornography focused largely on its exploitation and corruption of the innocent, and did not argue that this material taught us to hate the young. It might be argued on that basis that the dual rationale for extending the section, namely equality considerations and whether the evil aimed at actually can be described as material promoting hatred, is not present.



Given the nature of the material and submissions we have received in the area of child pornography, we doubt whether the dual rationale for extending the section to persons identifiable by age is present. We would make the same observations with respect to the other protected grounds listed in section 15 of the *Charter*. At this time, we simply have no evidence on which to conclude that hate propaganda with respect to these groups is being disseminated. On the other hand, however, we are aware that the imperatives of the *Charter* are strong ones. We have seen, in the case of the hate message section of the *Canadian Human Rights Act*, the *B.C. Civil Rights Protection Act, 1981*, and sections 281.1 and 281.2 themselves, how responding quite specifically to a particular emergency can result in legislation that can soon be perceived as too narrow.

We have concluded that it would be desirable to expand the definition of identifiable group in section 281.1(4) of the *Code* to include protection for an identifiable group based on sex or gender and we see little cogent reason for refraining from extending it to other groups named in the *Charter*, even if the need may not be immediately obvious. We think, however, that this change must be accompanied by implementation of the three changes recommended in *Equality Now!* and accepted by the Justice Minister of the day in responding to that report: removal of the requirement of wilfulness from the section; removal of the requirement that the Attorney General consent to a prosecution, and classification of the defences.

#### **Recommendation 38**

**The definition of “identifiable group” in subsection 281.1(4) of the Criminal Code should be broadened to include sex, age, and mental or physical disability, at least insofar as the definition applies to section 281.2 of the Code.**

#### **Recommendation 39**

**The word “wilfully” should be removed from section 281.2(2) of the Code, so as to remove the requirement of specific intent for the offence of promoting hatred against an identifiable group.**

#### **Recommendation 40**

**The requirement in section 281.2(6) that the Attorney General consent to a prosecution under section 281.2(2) should be repealed.**

We do not think that removing the requirement of specific intent which is contained in the word “wilfully” will leave section 281.2 unduly broad. Still in place is the requirement of general intent which is an ingredient of every criminal offence. Thus, a person who unwittingly or accidentally communicates a message will be spared conviction.

In the area of pornography, a wilfulness requirement would place an almost impossible burden on the prosecutor. The effect of material may be to engender hatred of women, but persons may all too readily establish that this was not done “wilfully”. The motive behind the publication may be described as sexual entertainment, or simply profit; even an unattractive motive, other than hatred, would serve to defeat a prosecution where specific intent was required. Such a result is surely not desirable, for it amounts to saying that one might create messages promoting hatred against women, or other groups, as long as that effect is only incidental to the profit motive.

We are mindful that some persons fear that removal of the requirement of the consent of the Attorney General will bring a flood of prosecutions, many of which would be ill-founded. The fear of potential harm to the innocent accused is behind these concerns. A slightly different perception of the issue is the concern that without the requirement of the Attorney General’s involvement, important cases which should be won will be bungled by inexperienced complainants, with or without legal advisers. With regard to the first of these concerns, the Report *Equality Now!* notes that there have been fewer than six prosecutions under the hate provisions since their enactment.<sup>15</sup>

We expect that attempts to use the revised section by way of private prosecutions may, indeed, occur frequently during the first period of its being in force. However, once the limitations of the provision are recognized by citizens and lawyers, resort to it may decline. The section, in our view, will indeed cover a very limited range of material, for much that is repellent, or even criminal, may not be considered to be a message of “hate”, even in the sense of misogyny. We hope that the other sections we propose to deal with pornography will, as well, reduce the need for persons to resort to private initiative by way of section 281.2.

We also think that extension of subsection 281.2(2) to include the hate messages of pornography may well require another change to the definitions in the section. At present, only “statements” are caught by the provision. Subsection 281.2(7) defines statements as including “words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations”. Because the general term “visible representations” may be interpreted along the lines of the specific ones preceding it, namely “gestures” and “signs”, we question whether the graphic images of pornography would come within this definition.

Many of the messages that convey hatred of women may be by way of visual representations, or a combination of the visual and written. At the hearing in Québec City, for example, we were shown a tabloid bearing on the front a photograph of a fully dressed woman, on her hands and knees, wearing a heavy leather dog collar and being pulled by a lead. Across the picture were words suggesting that as women are bitches, they should be chained. The combination of the colour photograph of the woman subjugated like an animal, and the words, was most compelling. In one notable instance, no words were used at all. Often drawn to our attention at the public hearings was a cover

from Hustler magazine showing a meat grinder. Protruding from the top were what remained of shapely female legs. Coming out at the other end was red minced meat.

We suggest that the term “visual representations” (or a term like it) be added to the section, to introduce some certainty as to whether a photo or other graphic way of conveying hatred would be included.

#### **Recommendation 41**

**The text of subsection 281.2(2) should be amended to make it clear that graphic representations which promote hatred would be covered by the provision. The subsection could prohibit “publishing statements or visual representations or any combination thereof, other than in private communications” which promote hatred against any identifiable group.**

Given the hope that our other proposed sections, particularly those dealing with sexually aggressive pornography, will deal with much of the material which offends, what area then is left to the hate provision? Violent or degrading material which is not sexually explicit may well be reached by a revised section 281.2. Additionally, we note that with respect to prosecutions under section 281.2, there is no defence of artistic merit, education or scientific purpose. The section may thus be regarded as a sort of complement to the provisions we have recommended to deal with “sexually violent and degrading” material, which do provide defences of these sorts.

We think that one of the important reasons for extending the reach of section 281.2 is because of the symbolic value of the extension. The ideas that pornography is a form of hate message about women, and intimately connected with the misogyny of our social institutions, are conceptually very significant. In shifting our thinking on pornography from notions of sexual impropriety to concerns about human dignity and responsibility, these ideas have illuminated, in our view, the real evils of pornography. As they are significant, they merit inclusion and embodiment in the criminal law.



## Footnotes

- <sup>1</sup> The definition is found at s.281.1(4) of the *Criminal Code*. It is incorporated into s.281.2 by s.281.2(7).
- <sup>2</sup> Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society, *Equality Now!*, (1984, Supply and Services Canada, Ottawa) at 69-70.
- <sup>3</sup> Minister of Justice and Attorney General of Canada, News Release: "Justice Minister Proposes Measures Against Hate Propaganda", June 1, 1984, at 1-2.
- <sup>4</sup> *Equality Now!*, Recommendation 37, at 71.
- <sup>5</sup> Minister of Justice News Release at 2.
- <sup>6</sup> *Equality Now!*, Recommendation 37, at 70.
- <sup>7</sup> *Ibid.*, at 69.
- <sup>8</sup> Minister of Justice News Release at 3-4.
- <sup>9</sup> *Saskatchewan Human Rights Commission v. The Engineering Students' Society, University of Saskatchewan et al.*, 7 Mar. 1984 unreported (Red Eye Decision) at 32.
- <sup>10</sup> Maxwell Cohen, "The Hate Propaganda Amendments: Reflections on a Controversy," (1970) 9 *Alta. L. Rev.* 103, at 113.
- <sup>11</sup> *R. v. Keegstra*, 5 Nov. 1984 (Red Deer) unreported (pretrial hearing).
- <sup>12</sup> *R. v. Keegstra* (pretrial hearing) at 20-23.
- <sup>13</sup> *Radio A.M. Broadcasting Regulations, amendment*, SOR/84-786, schedule, s.1 (amending s.5(1)(b)); *Radio (F.M.) Broadcasting Regulations, amendment*, SOR/84-787, schedule, s.1 (amending s.6(1)(b)).
- <sup>14</sup> *Television Broadcasting Regulations, amendment*, SOR/84-788, schedule, s.1 (amending s.6(1)(b)), *Pay Television Regulations*, SOR/84-797, s.6.
- <sup>15</sup> *Equality Now!*, Recommendation 35, at 69.



## Chapter 26

# Film Classification and Censorship

### 1. National Action

A number of submissions to the Committee suggested that Canada implement a film review and classification system on a national scale. There are several different ways of structuring such a system.

One would be to encourage the various provincial boards to consult with one another to develop uniform standards of acceptability. Then each board operating locally would apply the common standards, and no new body need be set up.

Alternatively, the provinces could set up a national or joint board to which each province would appoint representatives. The Manitoba legislation contemplates such a possibility by providing that Manitoba may co-operate with the governments of other provinces in appointing a joint film classification board of not more than 15 persons, nominated by the provinces. The joint board would classify films or slides to be exhibited in the member provinces.<sup>1</sup>

A third possibility is that the national review function could be an aspect of an expanded and improved Customs service. In Australia, the authority for the federal government to have a censorship board arises from its jurisdiction over Customs, and, by agreement, the states have given to the national board the power which they have to review locally produced films.

We have considered the suggestion that we opt for a national review function, (see Section II, Chapter 14 of the Report) along with each of the ways in which it would be possible to bring it about, and we have decided not to recommend this approach.

It seems to us that review at the provincial level serves a valuable function. We have been impressed by the desire of people to feel that they have access to the review process, and that they can influence its decisions. A national board would be even more remote, in the eyes of some, than the boards now located in the provincial capitals. Over and over again, we were told that standards of acceptability do vary from place to place in Canada. The provincial board can



and should be more sensitive to local taste, albeit within the framework of the national criminal law, than a national board could be. As we discuss elsewhere, we have recommended the deletion from the *Criminal Code* of the "community standards" test which now helps determine whether material is obscene, because we do not think that this element of subjectivity has a role to play in the criminal law. The community does, however, have a useful role in determining what it wants its young people to see, as opposed to determining what is criminal, and we think that that role can be exercised to more effect on a provincial rather than a national basis.

#### **Recommendation 42**

**Canada should not opt for a national film review system, but rather maintain the existing arrangement whereby review is done on a province by province basis.**

## **2. Problems with Co-ordination of Provincial Regulation**

Having rejected the prospect of review on a national scale, however, we must still observe that there are problems affecting a provincially-oriented system which bear looking into. We have noted that some provinces and territories have no local film review authority. In this position are Newfoundland, Prince Edward Island, the Yukon and the Northwest Territories. Although they may consider it suitable to borrow the classifications of others, it seems that absence of legislation may be depriving them of more than a classification function.

The provincial film review legislation, for example, requires that theatre operators observe classifications, advertise them, and post them by the entrance to the theatre for the guidance of patrons. We heard complaints in Whitehorse that local theatres were inconsistent in their practices concerning notification of film classifications. Parents were sometimes unable to determine whether or not a particular movie would be suitable for their children. Some complained, in a similar vein, about non-enforcement of age restrictions on entrances to theatres.

Accordingly, we think that it would be desirable for provinces without film review legislation at present to explore whether they wish to enact it, in whole or in part. Even if they do not have the inclination or the resources to institute review of films, the aspects of the typical film review legislation which might usefully be enacted are those concerning notification of the classifications and entrance restrictions for children.

#### **Recommendation 43**

**Those provinces and territories which have not implemented a film review system should consider doing so.**

Another difficulty which will persist with a provincially-based system of review and classification is the problem that clearance in the most permissive jurisdiction can be, in effect, clearance for national purposes if the films are videotaped and then made available for private as opposed to public usage. It is, in our view, inevitable that entrepreneurs will take advantage of the differences in standards between provinces by using the most permissive jurisdictions as clearing houses for films destined for national distribution as videos. Mail order houses based in these provinces will offer material to a national market.

This problem of the *de facto* national influence of the boards in some jurisdictions in this regard was addressed by many briefs at our public hearings. The boards most often noted in this connection are those of British Columbia and Québec, which take a more tolerant view of some kinds of explicit material than does, say, Ontario. This issue generates considerable frustration and concern, especially among those whose views do not accord with the views of the boards which they perceive to be having this national influence.

We can appreciate the concern that is reflected in these submissions. However, in most jurisdictions, only films or videotapes intended for commercial exhibition are required to be reviewed and these represent a small proportion of the total amount of material in circulation. Videotapes, not films, are the largest aspect of the home viewing market. At this time, videotapes for private use can be imported or produced and sold in most jurisdictions without any contact at all with provincial classification or censor boards. The circulation of the bulk of this video material cannot thus be laid at the door of any censor board, however relaxed may be its views on what is acceptable in films.

Moreover, we note with interest the introduction in some provinces of schemes to regulate sale and rental of videotapes intended for private consumption. This direct attack on the problem of unsupervised circulation of allegedly offensive material may be more effective than any attempt to enforce uniform standards on all boards, or establish a national board.

### 3. Relationship Between Customs and Film Classification

It seems to us that the real influence bearing on the circulation of offensive material within Canada is that of Customs. It is, after all, through Customs clearance procedures that films and videotapes are imported. One can expect provincial film review authorities to be, if you will, a second filter for videos which are imported only if someone within the province exhibits them commercially or otherwise brings them within the comparatively narrow scope of the film or video classification scheme.

Accordingly, we think that the emphasis in our inquiry about national circulation of offensive material should be at the point of entry: the Customs administration. We are, in regard to pornography as in regard to so many other things, an importing nation. The film review boards, even if co-ordinated on a national level, cannot really be expected to control the adverse effects of importation.

In one respect, however, the link between Customs and film review authorities bears closer examination. As we have said, films or videos intended for commercial showing must be reviewed by provincial authorities. Before they can be reviewed, they must be in the country. To effect their entry, their importers would ordinarily be required to satisfy Customs officials that the films are not "immoral or indecent", under the wording of the present *Customs Tariff*.

There has grown up a practice in some jurisdictions of rolling into one, the Customs determination of acceptability for entry and the provincial film review board's determination of acceptability for showing. There are many reasons for doing this. On a practical level, importers will not want to go to the trouble of bringing a film into the country only to be told some time later that it cannot be shown in the province. In addition, the volume of material passing through Customs is so large that the relief of sharing the review work with another authority may be welcome. On a more fundamental level, many believe that it is not the role of Customs officials to act as the arbiters of public taste. Although to some observers, this view extends to claiming that neither Customs nor the film classification boards should play this role, in others, it merely results in a preference for the provincial authority over the Customs branch.

Whatever its rationale, it is clear that this practice involves deference by the Customs officials to the view of the film review board. Such deference can manifest itself in a number of ways. In Ontario and British Columbia, films being imported go in Customs bond directly to the office of the censor. In Québec, a practice has developed of allowing the importer to take the films from Customs and deliver them to the Bureau de Surveillance. There is no control over what happens to the film on its way from Customs to the office of the Bureau. A period of 60 days is given by Customs to the importer in which to seek clearance of the film from the Bureau. In all these cases, once the film is approved by the provincial censor, it is granted entry to Canada, effective not from the date of the censor's clearance but rather from the date of its initial entry at the Customs port. Customs officials do not consider that they have totally delegated their own powers to the various censor boards, because they still retain, in theory, the power to refuse entry even to a film which has been accepted for exhibition in a province.

We heard numerous complaints about this sort of relationship between Customs and provincial film reviewers. Singled out for special complaint was the 60-day grace period allowed to films entering by way of ports in Québec. It was felt that the unscrupulous could use this period to make videos of the film



which had been put in their custody. Then, even if it did not receive clearance for showing in the province as a film, the videos would nonetheless be circulating. Some witnesses have attributed to this scheme a high proportion of the offensive videotapes which they say are now circulating in Canada. It should be noted, however, that although such procedures may contribute to the circulation of pornographic tapes, a much more likely factor is that Customs only inspects a very small proportion of what actually comes into the country. Nevertheless, we have reservations about the apparent delegation by Customs authorities of their power to assess material entering the country. We are not comforted by their retention of a notional power to refuse or permit admission of a work contrary to the view of the local review board. In practice, we think such an overruling is unlikely to happen.

Our problem with this delegation is that it cuts into the attempt, and the opportunity, to forge national standards in the administration of the *Customs Act* and *Customs Tariff*. However much we may want to recognize the role of local taste in determining who sees what in provincial theatres, we think that there should be common national standards about what comes into the country.

We do not think that Customs officials should defer to the opinion of local boards. While to do so may have been helpful and convenient when the standards used by Customs to determine obscenity, and the level of officers' understanding, were relatively unsophisticated, we prefer that Customs concentrate in developing its own talents in this area. Although to resort to provincial assistance might be tempting given the scant resources available to Customs for the "pornography detail", we think that the focus should move to securing more resources. In our view, only the development of an active and sophisticated Customs will really address the problems of entry into Canada of pornographic material.

We have attempted to discover the details of the 60-day grace period in Québec which so angered some of the witnesses at our public hearings. They are discussed in detail in Section II, Chapter 14. Here, let us observe that, in our view, the more serious problem is the general influx through Customs of material which, because it will not be shown publicly, may never even be legally required to go to a film censor, rather than the possible abuse of the Customs/censorship interface in respect of a small amount of material. Over and above that, however, we have been advised that Customs officials are interested in ending this arrangement. We urge them to do so.

#### **Recommendation 44**

**Film review boards and Customs authorities should not enter into arrangements whereby local film review boards have de facto control over what enters Canada; we further recommend that the 60-day clearance period allowed by Customs to films entering by way of Québec ports be discontinued.**

## 4. Problems of Substance

We do not intend to comment here in depth on the details of running a provincial film review system. However, a few aspects of provincial regulation do have a bearing on our recommendations.

In devising our approach to pornography, we have proposed a three-tier classification of material. The most offensive material, that involving children or in which harm is suffered by the participants in its production, we would subject to harsh penalties, with no defences based on intent or value being available. The second tier of material is that which is sexually violent and degrading. Here we have recommended a new prohibition with respect to which the accused could defend the material (here a film or video) on the basis that it has artistic merit, or educational or scientific purpose. Material in this category is also subject to restrictions on its public display and on access to it by young people.

The third tier of material is that in respect of which we think there should also be controls on availability and display, but no absolute criminalization. We have restricted the use of the *Criminal Code* in this tier to prohibiting availability of this material to children, and to reducing its visibility and thus its capacity to shock or offend the unwilling consumer or passerby.

Because Customs is unlikely to be able to control the importation of all films and videos, we realize that some films which people would argue are unacceptable, will come into the country. In addition, of course, films that are produced within the country go to the provincial boards without any intermediary review.

Provincial film review boards will, therefore, be required to deal with all films that are presented to them with the purpose of being shown publicly. How they choose to respond to the material may vary, as it presently does among the boards. One approach is simply to classify the films according to the provincial scheme. A second approach involves the banning or cutting of films prior to a classification being designated.

One of the important roles of the state with respect to pornographic material is the protection from offence. We do not think, however, that as a rule, banning is necessary in order to protect people from being offended. We think that the classification systems now in place in the provinces have a major role to play in preventing offence, as do the controls on access to theatres by young people. The requirement of posting and advertising the classifications and the further requirement, in some jurisdictions, of warnings about certain kinds of content, are also in our view effective and desirable ways of helping people avoid the material which they do not want to see.

While we endorse measures like these in general, we do note that there are some difficulties with the working out in practice of these systems. Particularly with respect to classification, we are concerned that the standards upon which



classification is being done do not always appear in the legislation, or even the regulations. We regret this for two reasons.

Firstly, the legislative delineation of standards is a valuable way to protect against improper use of discretion in the administration of a scheme; the rights of exhibitors will be safeguarded when the legislature enunciates standards which must be observed by those administering the law. Secondly, articulation in legislation ensures a certain publicity for the standards, and allows citizens to know what is being done on their behalf. No matter how many pamphlets a board may distribute discussing its classification scheme, the legislative articulation still is the most enduring. A government may wish to include its standards in regulation rather than legislation, because regulations can be more responsive to changing community values. However, in our view, positive results will flow from greater elaboration of the classification standards in law, be it statute or regulation.

We have also observed that the legislation often does not contain any articulation of the standards upon which a board will be prohibiting or cutting films. What we have said above about the advantages of enunciation of standards in law, we reiterate even more forcefully in this connection. The power to prohibit exhibition of films or to cut them is an intrusion on the right of freedom of expression guaranteed by paragraph 2(b) of the *Canadian Charter of Rights and Freedoms*. It must be a reasonable limit, *prescribed by law* and demonstrably justifiable in a free and democratic society, in order to survive constitutional challenge. The case challenging the Ontario *Theatres Act* shows, in our view, that these provisions for prohibiting and cutting films are on an infirm constitutional footing. We think that the provinces will be interested in reviewing them to ensure compliance with the *Charter of Rights*.

Of course, one way of ensuring compliance with the *Charter* is to remove from the provincial boards the power to cut or to ban films. We prefer this approach. If the provincial board is of the view that the film is caught by the prohibitions against first or second tier material, then presumably the board does not need any additional power to prohibit or to cut it. For greater certainty, the statute may provide that the board may decline to classify a film which, in its view, contravenes the *Criminal Code*, but there would be no power to cut, and no power to prohibit the showing of anything not prohibited by the *Criminal Code*. If material is not prohibited by the *Code*, then we believe that it should be shown, at least to those who wish to view it.

#### **Recommendation 45**

**Provincial film review boards should have an explicit statutory mandate to refuse to permit exhibition in the province of films which are contrary to the Criminal Code. Provincial film review boards should not be empowered to prohibit or cut films which are not contrary to the Criminal Code.**

If the provinces decide to maintain the power to prohibit or cut films, then we strongly recommend that the standards upon which these decisions will be made should be embodied in legislation, or at least in regulations.



**Provincial film review legislation or regulations should contain explicit standards to govern the boards' activities in classifying and, where these powers exist, in prohibiting and cutting films.**

## 5. Advertising Restraints

There exist in provincial legislation, broad powers to control advertising of films. In addition to specific provisions requiring that the classification of a film be shown in advertising material for it, the legislation usually confers a power of prior restraint of advertising on the authority. Advertisements must be submitted to the board, which may approve or disapprove them.

We think that the rationale for this system of prior restraint has a lot to do with the exercise of the prior restraint powers of the boards with regard to film censorship. It would be regarded as inconsistent to go to the trouble of removing a particular scene from the film only to have it appear on the billboards outside the theatre. Interestingly enough, however, Manitoba, a province which does not censor films by way of prior restraint, has not only a power to impose prior restraint on advertising<sup>2</sup> but also a very intrusive power to remove offensive advertising from public places.

Any peace officer or inspector in Manitoba may be authorized by the board to order the removal from all public places of any advertisement relating to any film or slide if the advertisement is of an immoral, obscene or indecent nature or depicts any murder, robbery, criminal assault or the killing of any person. If the licensee of a theatre does not remove the material within 24 hours, then the licence will be cancelled by the Minister. There does not appear to be any right of appeal from an inspector's order.<sup>3</sup>

We are concerned with both the prior restraint of advertising and with broad power like that in the Manitoba statute just described. On the other hand, we think that it is quite reasonable, and entirely consistent with a scheme of classification, to require the theatre owners to include the classification of the film in advertising for it.

It seems to us that prior restraint on advertising is difficult to justify in light of the provision we have made to control display of visual pornographic material, discussed above. This provision would make it an offence punishable on summary conviction to display visual pornographic material so that it is visible to members of the public in a place to which the public has access by right or by express or implied invitation. In our view, this offence would include display of such material in a theatre or outside it. The defence to the charge would be to demonstrate that the visual pornographic material was displayed in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advertising of the display within.

This sort of control upon the location of the third tier material is, to us, a far less intrusive way of protecting public sensibilities than the imposition of prior restraint.

#### **Recommendation 47**

**The provinces should not exercise a power of prior restraint over advertising of films; however, the power to require that film classifications be included in an advertisement should be kept.**

## **6. Relationship Between Provincial Film Review Boards and the Criminal Law**

The Supreme Court of Canada has stated that there is no constitutional reason why a prosecution cannot be brought under the obscenity provisions of the *Criminal Code* against a film which has been approved by a provincial review board.<sup>4</sup> Under the *Code* as it now stands, the issue is whether approval of a provincial censor board would amount to a defence against a charge under section 159 or section 163 of the *Code*. Section 159(2) prohibits the doing of a number of acts “without lawful justification or excuse”, and it is argued that the approval of a censor board should, in law, amount to such a lawful justification. The Canadian Motion Picture Distributors Association made representations to this effect to our Committee.

As we have noted earlier in this Report, Bill C-19, the omnibus Criminal Law Amendment Bill introduced in early 1984, would have recognized the operation of provincial law respecting film classification. With respect to offences under sections 159 and 163 of the *Code* the bill proposed a new section 163.1, which would have required the personal consent of the Attorney General to a prosecution of a film or videotape presented, published or shown in accordance with a rating or classification established pursuant to the law of the province where the film was shown. This provision would not have helped in those provinces without a local film classification system, of course, but the Motion Picture Distributors’ Association nonetheless regarded it as an improvement over the previous laws.

We do not include in our proposed amendments any provision of this nature. We recognize that whether they have explicit power to ban films or not, an authority will inevitably make a preliminary determination of whether, in its view, a film offends the *Criminal Code*. Yet, even though this determination about criminality is going to be made, we do not think that it is desirable to elevate the board’s judgment to the status of a defence or a discretionary bar to prosecution. If the board’s decision were to constitute a full defence, then we would have, in effect, a delegation to provincial authorities of administration of the criminal law sanction. Where the decision of the board is a discretionary bar to prosecution, as in Bill C-19, the delegation is not complete, but the concern remains the same.



True, local prosecutors make decisions about what charges to bring under the *Criminal Code* and that is a form of decentralization, but it is not decentralization that is really the concern here. In our view, the objectives and the outlook of the classification or censor boards, while somewhat congruent to those of the law enforcement authorities, are nonetheless different from them. They are concerned primarily with community tastes, with the making of those kinds of subjective evaluations about what offends which we have sought to remove from the criminal law. We do not think that it would be useful to reintroduce that element into the law, indirectly, by means of reliance on the judgment of classification or censor boards about what breaches the criminal law.

It will be said, of course, that one is relying on the board's assessment of what does not breach the law, rather than on their assessment of what does. Surely, it will be argued, we can be certain that something does not offend the law if it is approved by a board as strict as the Ontario one, for example, and we need not hesitate about conferring immunity from prosecution. Here we meet again the concern about the variation from jurisdiction to jurisdiction in local censor board standards. Some boards may well take a different, and more permissive view, of the criminal threshold than would the local Crown attorney or the court. If a film were passed by such a board, then one might still not wish to insulate it from scrutiny by a court. In such a case, a provision like that in the proposed section 163.1 would produce the unhappy spectacle of the Attorney General and classification or the censor board at loggerheads.

The standards used by Crown attorneys and judges to determine criminality may well, of course, vary from place to place. But the fact of regional variation in the criminal justice system does not mean that we should add yet another system (itself affected by regional variation) to the decision-making process, possibly to conflict with the criminal justice system.

We are prepared to make one exception to this general position, an exception which is made necessary in our view by our recommendation on access of children to visual pornographic material. We have recommended that the *Criminal Code* make it an offence punishable on summary conviction for everyone who is the lessee, manager, agent, or person in charge of a theatre, to present therein to anyone under 18 years of age, any visual pornographic material. This provision could well include the acts of a theatre owner in showing a movie classified in the adult or similar category, for viewing by persons over 14. The film, while not restricted, might nonetheless contain some scenes which would attract the operation of the proposed section.

We have provided a defence to this offence for anyone who can demonstrate that the film or tape has been classified under the rating system for film and video in the province, as acceptable for viewing by those under 18. Thus, the certification of the board would insulate the theatre operator from prosecution.



Here, we are not deferring to the decision of a provincial authority about whether to prohibit a film or not; we are dealing with classification only. Moreover, the material being classified is, we assume, legal according to the *Criminal Code* provisions we have devised. Otherwise, presumably the board would not have classified it at all. So, we are really deferring here to the board's judgment about who should see legal material. We are content to defer in these circumstances.

#### **Recommendation 48**

**Clearance for exhibition by a provincial authority should not constitute a defence or a discretionary bar to a prosecution under the Criminal Code, with the exception that a film classification permitting a film to be shown to persons under 18 will constitute a defence to a charge of displaying visual pornographic material to a person under 18.**

## **7. Regulation of Video Recordings**

There was strong support at the public hearings for review and classification schemes applicable to video recordings sold or rented for private use. The major concern of advocates of this proposal was for young people. Worried about the kinds of violence, degradation and explicit sex which children might be seeing on videotapes, parents and others were concerned that they now have almost no effective way of monitoring children's viewing.

We were told that the covers and advertising of videotapes often do not give accurate clues about the nature of the film. The merchants who rent tapes may not be as vigilant as many would hope in ensuring that young people avoid the worst material. Even where the retailer is watchful, young people may be getting videotapes in the same way that they traditionally got liquor or cigarettes: having an older youth obtain supplies for younger peers.

The ease with which videotapes can be duplicated means that they will be widely and readily accessible. Outlets have proliferated, with videotapes being available anywhere from the large department store to the corner gas station to the specialized video outlet, be it an "adult" video club or neighbourhood family store. Video recorders are now reasonably widely available in private homes across Canada, and home viewing means that consumption of the materials can take place in private. For many young people, this means away from supervision.

At present, only Ontario and Nova Scotia have included distribution of videotapes for private viewing within the provincial classification schemes.<sup>5</sup> Apart from these initiatives, which happened so recently that information about how effective they are was not available to us, there are almost no controls on videotapes intended for private use. Conceivably, of course, importation of videotapes would be subject to Customs regulation, but there was a widespread feeling that this is presently most ineffective. There simply

are not the resources to enforce the *Customs Tariff* thoroughly. The distribution by mail of obscene videotapes would be within the *Criminal Code* and *Canada Post Corporation Act* provisions respecting use of the mails for distribution of pornographic materials, but here again, enforcement is perceived as ineffectual.

We can see some real merit in having a regulatory scheme designed for video recordings that are not shown publicly. We believe that the scheme should include only classification, but not prohibition or cuts. The power to prohibit, in our view, should be no more than a power to prohibit circulation of material offending the *Criminal Code* law, as we have recommended in the case of film classification.

#### **Recommendation 49**

**Each province should establish a system of review and classification for video recordings intended for private use in the province. Under such a system, the review board should be given an explicit statutory mandate to refuse to classify video recordings which are contrary to the Criminal Code but not be empowered to prohibit or cut video recordings which are not contrary to the Criminal Code.**

Both Nova Scotia and Ontario have used the device of the film exchange licence to bring video retailers within the ambit of provincial legislation. Clearly, in our opinion, regulation of videotapes belongs at the provincial level, if done at all, and we see merit in the Ontario and Nova Scotia approach.

There are a number of problems which confront any authority seeking to regulate videotapes. One of the threshold issues is whether and to what extent videotapes should be submitted to a board and classified. At the point of starting up a system, the classification task (of all existing tapes available in retail outlets) would be huge. Even once that bulk had been digested, however, the large number of videotapes in circulation would still make the classification task formidable.

Even though regulation of videotapes is a recent innovation, there are already two different approaches to this problem. The *Video Recordings Act, 1984* of the United Kingdom requires that all videotapes, except for those in certain exempted categories, be presented to the authority in order to be classified. Nova Scotia, on the other hand, recognizes that tapes in an "unclassified" class will be distributed. In many instances, the videotape will be a reproduction of a film which itself has already been classified, and the classification of the original film will apply to the tape. However, not all tapes will be reproductions of classified works. It is clear that the thorough solution, to classify everything, is also the most demanding of resources.

The issue of advertising the classification may well present some technical difficulties. Affixing labels to the cartons and the tapes is possible, but boards may wish to consider whether it is possible or desirable to put some mark on



the actual film of a cleared tape. In the course of our consultations, we learned of the importation into Canada of a large number of empty boxes for a particular videotape. No tapes of that title were cleared through Customs. The cartons seem to have been destined for underground copies. Unless some symbol of board approval, which is difficult to counterfeit, could be put on the tape itself, it would be difficult to control this type of circumvention of a local system.

The Nova Scotia plan has a feature which we find quite attractive in the context of this problem of advertising. The regulation requires the retailer to put the classifications on each list of tapes distributed to customers. Such a requirement will aid in achieving what must be one of the most important objectives of this type of scheme: putting into the hands of parents and other adults the means of monitoring and guiding the viewing activities of their youngsters.

Another issue to be faced by those contemplating establishment of a video classification scheme is that of penalties for breach. Presumably, a key element in the scheme would be a requirement that persons not distribute tapes to those for whom the classifications indicate they are not intended. Our survey of the provincial censorship legislation shows, however, that any penalties provided for breach of the *Acts* or regulations are quite small. As systems founded on prior restraint, and aimed at preventing showings rather than penalizing them after the fact, these censorship regimes have not depended for their efficacy on prosecutions.

Yet proliferation of videotapes and the tremendous variety of outlets where they may be available, coupled with an absence of prior restraint, leads us to suggest that the issue of penalties should be a serious one to framers of any video regulation scheme. The *Video Recordings Act, 1984* of the U.K. provides quite substantial penalties. Supplying a video work in respect of which no certificate has been issued will, for example, attract a fine not exceeding £20,000.<sup>6</sup> Forfeiture of the videotape involved in the offence is also called for.<sup>7</sup> We think that using stiff penalties for violations of the scheme is preferable to using prior restraint.

A further element of a video retailer licensing scheme might usefully be considered. If retailers were required to keep a log showing the source, to them, of the various tapes which were sent to their stores, then bootleg tapes might be more readily detected. A tape which appeared in stock but in respect of which there was no *bona fide* supplier listed in the log, could well prompt the sorts of inquiries which might disclose not only breaches of the classification system but also of Customs legislation.<sup>8</sup>



## Footnotes

- <sup>1</sup> See s. 22(4) of the Manitoba *Amusements Act*, enacted by S.M. 1972, c. 74, s.4.
- <sup>2</sup> *Ibid.*, s.22(3)(b).
- <sup>3</sup> R.S.M 1970, c. A70, c. 24.
- <sup>4</sup> *Re Nova Scotia Board of Censors et al and McNeil*, [1978] 2 S.C.R. 662, (1978) 84 D.L.R. (3d) 1, *per* Ritchie, J. at 24.
- <sup>5</sup> The government of British Columbia announced plans to regulate videotapes early this year. The details of those plans have not yet been made public, however.
- <sup>6</sup> *Video Recordings Act*, 1984, c. 39 (U.K.) s.15.
- <sup>7</sup> *Ibid.*, s.21.
- <sup>8</sup> A parallel to this recommendation is the provision in s.103 of the *Criminal Code* requiring firearms merchants to keep a record of transactions and an inventory of firearms.















